No. 17-193 *** CAPITAL CASE ***	
Title:	**Jefferson Dunn, Commissioner, Alabama Department of Corrections, Petitioner** **v.** **Vernon Madison**
Docketed:	August 4, 2017
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Numbers:	(16-12279)
Decision Date:	March 15, 2017
Rehearing Denied:	May 4, 2017

DATE	PROCEEDINGS AND ORDERS
Aug 02 2017	Petition for a writ of certiorari filed. (Response due September 5, 2017)
Sep 05 2017	Brief of respondent Vernon Madison in opposition filed.
Sep 05 2017	Motion for leave to proceed in forma pauperis filed by respondent Vernon Madison.
Sep 14 2017	Reply of petitioner Jefferson Dunn, Commissioner, Alabama Department of Corrections filed.
Sep 20 2017	DISTRIBUTED for Conference of 10/6/2017.
Oct 10 2017	DISTRIBUTED for Conference of 10/13/2017.
Oct 23 2017	DISTRIBUTED for Conference of 10/27/2017.
Oct 30 2017	DISTRIBUTED for Conference of 11/3/2017.
Nov 06 2017	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Nov 06 2017	Petition for certiorari GRANTED, judgment REVERSED. Opinion per curiam. (Detached **Opinion**). Justice Ginsburg, concurring. (Detached Opinion). Justice Breyer, concurring. (Detached Opinion).

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RECORD AND BRIEFS

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In the Supreme Court of the United States

JEFFERSON DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Petitioner,
v.
VERNON MADISON,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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August 2, 2017

QUESTIONS PRESENTED
(Capital Case)

Over thirty years ago, Vernon Madison shot and killed a police officer. Last year, after his execution was set, Madison filed a petition in state court challenging his competency to be executed. Madison's own expert testified that Madison understands "the meaning of a death sentence," "the nature of the pending proceeding," "what he was tried for," and "that he's being executed." But Madison's expert also concluded that Madison could not remember committing the murder. The state court's own appointed expert testified that Madison could remember details of his life, including around the time of the murder, and "was able to discuss his case in a very accurate manner." The state court held that Madison was competent to be executed.

After a federal district court denied Madison's habeas petition, the Eleventh Circuit stayed his execution. Four members of this Court voted to vacate the stay, but it was left undisturbed by an equally divided Court. Later, in a divided opinion, the Eleventh Circuit held that the state court was "patently unreasonable" when it found Madison competent to be executed because he is "a man with no memory of what he did wrong."

This petition raises two questions:

(1) Do this Court's precedents clearly establish that a prisoner is incompetent to be executed for a murder because he does not remember or acknowledge committing it?

(2) Was the state court objectively unreasonable in concluding that Madison was competent to be executed?

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The district court's order denying Madison's habeas petition and motion for stay of execution is unreported and reprinted in the appendix at 38a-66a. The Eleventh Circuit's opinion reversing is reported at 851 F.3d 1173 (CA11 2014), and reprinted in the appendix at 1a-37a. The state court's order determining that Madison is competent is unreported and reprinted in the appendix at 67a-81a.

STATEMENT REGARDING JURISDICTION

Jurisdiction is proper. *See* 28 U.S.C. § 1254 (1). The district court had jurisdiction to consider the habeas petition. 28 U.S.C. § 2254 (d). The Eleventh Circuit issued the opinion under review on March 15, 2017. App. 1a. The Commissioner filed a timely application for rehearing, which the Eleventh Circuit denied on May 4, 2017. *See* App. 82a-83a. This petition is timely filed within 90 days.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII.

The pertinent section of the Anti-Terrorism and Effective Death Penalty Act states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

> judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d).

STATEMENT OF THE CASE

In April of 1985, Vernon Madison killed Officer Julius Schulte during a domestic dispute. At the request of Madison's neighbors, Officer Schulte was protecting Madison's ex-girlfriend and her 11-year-old daughter while Madison moved out of their house. After pretending to leave, Madison retrieved a pistol, sneaked behind the police car where Schulte was sitting, and fired two shots into the back of Schulte's head. *Madison v. State*, 620 So. 2d 62, 64 (Ala. Crim. App. 1992). After shooting Officer Schulte, Madison shot his ex-girlfriend in the back as she tried to run away. *Id.* Three eye witnesses watched Madison murder Officer Schulte and attempt to murder his girlfriend. *Id.*

Madison was charged with capital murder because he had murdered an on-duty police officer. *See* Ala. Code § 13A–5–40(a)(5). He was tried and convicted three times because of errors in his first and second trials. *See Madison v. State*, 545 So.2d 94, 99 (Ala.Crim.App.1987); *Madison v. State*, 620 So.2d 62, 63 (Ala.Crim.App. 1992); *Madison v. State*, 718 So.2d 90 (Ala.Crim.App. 1997). Madison denied committing the murder before his first two trials and claimed self-defense at his third. After each trial, Madison was sentenced to death in light of his history of violent crime. His third conviction and sentence were affirmed by the Alabama Court of Criminal Appeals, *id.* at 104, and the Alabama Supreme Court, *Ex parte Madison*, 718 So. 2d 104, 108 (Ala. 1998). His appeals were denied on direct review, and, after an evidentiary hearing in federal court, he exhausted his state postconviction and federal habeas claims. *See Madison v. Thomas*, 135 S. Ct. 1562 (2015).

After the Attorney General asked the Alabama Supreme Court to set an execution date, Madison filed a state-court petition claiming he was incompetent to be executed because, among other things, he could not remember murdering Officer Schulte. Doc. 8-1.

A. The state court holds a competency hearing.

This Court has held that the Eighth Amendment prohibits a state "from inflicting the penalty of death upon a prisoner who is insane." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). But it has left discretion to lower courts to determine how to meet that standard. Although a lower court cannot "foreclose[]" an inmate "from establishing incompetency by . . . a showing that his mental illness obstructs a rational understanding of the State's reason for his execution," this Court has

not "attempt[ed] to set down a rule governing all competency determinations." *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007). The Court has also held that a state may execute prisoners who "fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness," such as a "misanthropic personality or an amoral character." *Id.* at 959.

The state court set a hearing to evaluate Madison's claims of incompetence and gave Madison the opportunity to submit evidence, including from his own psychological expert. Doc. 8-2 at 4. Before the hearing, Madison was evaluated by Dr. John Goff (a neuropsychologist retained by Madison) and Dr. Karl Kirkland (a court-appointed psychologist). At the hearing, the state court admitted Dr. Goff's report, Dr. Kirkland's report, and Madison's medical records. *Id.* at 5-9. The state court also heard testimony from Dr. Goff, Dr. Kirkland, and the warden of the prison where Madison was housed.

1. Dr. Goff's testimony. Dr. Goff testified that Madison experienced cognitive decline after suffering a stroke. Nonetheless, Dr. Goff concluded that Madison understands "the meaning of a death sentence." Doc 8-3, Tab R-14 at 7 (expert report). Dr. Goff further concluded that Madison said his crime "must have been a murder," that he had three trials, and that he felt his "conviction was unjust." *Id.* But, according to Dr. Goff, Madison could not remember the name of the victim, and he did not think he killed anyone because he purportedly "never went around killing folks." *Id.*

Dr. Goff concluded that Madison "is able to understand the nature of the pending proceeding and he has an understanding of what he was tried for." Doc. 8-3,

Tab R-14 at 8 (expert report). But, based on his interview with Madison, Dr. Goff opined that Madison did not have an independent recollection of the murder. Thus, Dr. Goff concluded that Madison did not understand the rationale of the current proceeding as it applied to him. *Id.* at 8-9. Dr. Goff remarked, "I think he understands that he's being executed. but I don't think that he understands why, because I don't think he has those--those memories." Doc. 8-1, Tab R-9 at 55 (hearing). Similarly, Dr. Goff concluded that "I think he understands that [the State is] seeking retribution" but "I don't think he understands the act that he's being -- that he's being punished for." *Id.* at 65. When Dr. Goff formed that conclusion, he was not aware that Madison had always denied responsibility for the murder. *Id.* at 65.

Dr. Goff gave three reasons for believing that Madison cannot remember killing Officer Schulte. First, Dr. Goff concluded that Madison had experienced a thalamic stroke. Doc. 8-3, Tab R-14 at 8 (expert report). Second, Dr. Goff relied on Madison's statements that he does not recall the murder and that he "never went around killing folks." *Id.* at 7; Doc. 8-1, Tab R-9 at 60-61 (hearing). Third, Dr. Goff relied on his evaluation of Madison, including a test he administered showing Madison's trouble completing basic tasks and remembering basic information and Madison's tendency to speak in a rambling vague manner, which indicated to Dr. Goff that Madison "can't remember what it is that he's told me." Doc. 8-3, Tab R-14 at 7 (expert report), Doc. 8-1, Tab R-9 at 59 (hearing).

2. Dr. Kirkland's testimony. The state court appointed Dr. Kirkland to evaluate Madison as a neutral expert on behalf of the court. After Dr. Kirkland evaluated Madison, Dr. Kirkland concluded that Madison

has had "significant body and cognitive decline as a result of strokes." Doc. 8-1, Tab R-9 at 19 (hearing). Nonetheless, Dr. Kirkland concluded that Madison has a rational understanding that he will be executed for killing a police officer in 1985. *Id.*; 8-3, Tab R-13 at 10 (expert report). Dr. Kirkland determined that Madison has a "rational understanding of the sentence, [and] the results or effects of the sentence . . . ." *Id.* at 11. Dr. Kirkland also found that Madison had normal thought content and showed no symptoms of psychosis, paranoia, or delusion. *Id.* at 9.

Dr. Kirkland's conclusions were based on his evaluation of Madison, his review of Madison's medical records, and his discussions with Madison's treating physicians. At the evaluation, Madison gave Dr. Kirkland a detailed history of his life, his criminal record, and his conviction for murder. For instance, Madison said he was the son of Willie Seale and Aldonnia Madison, was "born in an old Mobile Hospital for African Americans that no longer exists," and that he is the "oldest of 11 children, seven boys and four girls," four of whom have died. Doc. 8-3, Tab R-13 at 4-5 (expert report). Madison said he was raised "on the end of Old Stanton Road in Mobile, where Stanton Street runs into Stanton Road." *Id.* at 5. Madison remembers his multiple juvenile arrests and the details of these crimes, including shooting a man in Mississippi, and the time he escaped from the Mt. Meigs Department of Youth Services Camp, hitching "rides all the way back home." *Id.* at 4. Madison remembered trying to join the Army during the Vietnam War because he "knew they would draft him one way or the other," and he remembers being "excluded from the Army by the physical due to be[ing] rated 4F." *Id.* at 5.

Madison also remembered details of his multiple trials, convictions, and appeals. Madison discussed each appeal and "marveled each time with the fact that the whole process would end up being back in Judge McCray's court." *Id.* at 9. Dr. Kirkland testified that "[Madison] was able to talk with me about very specific things that would indicate that he could remember specific things about the time of the offense even, as well as each trial." Doc. 8-1, Tab R-9 at 68 (hearing). Dr. Kirkland determined that although Madison had physical and mental limitations, Madison "clearly was able to discuss his case in a very accurate manner, including being able to accurately tell this examiner legal theories about why Judge McCray should have recused himself and why he refused to do so." Doc. 8-3, Tab R-13 at 10 (expert report). When asked if Madison had a rational understanding of the reason for his execution, Dr. Kirkland replied, "Certainly. He talked specifically about death sentence versus life without in the original trial and the first retrial and in the second." Doc. 8-1, Tab R-9 at 75 (hearing).

3. The Warden's testimony. The warden testified that when Madison received the death warrant setting his execution date, Madison expressed no confusion or lack of understanding of what it meant, commenting, "[M]y lawyers are supposed to be handling that." Doc. 8-1, Tab R-9 at 75 (hearing). The warden also testified that Madison was not receiving treatment for a mental condition in prison. *Id.*

4. The state court's decision. The state court issued a detailed order, finding Madison competent to be executed. App. 69a-83a. The state court found that "Madison has a rational[] understanding, as required by *Panetti*, that he is going to be executed because of

the murder he committed and a rational[] understanding that the State is seeking retribution and that he will die when he is executed. . . . ." App. 82a. In reaching this conclusion, the state judge relied on a number of facts from the hearing, Dr. Kirkland's examination, and Madison's medical records. *See* App. 82a.

Alabama law does not provide a right to appeal this determination in the state court system. *See* Ala. Code § 15-16-23. This is because of the expedited nature of last-minute litigation about executions and because the Alabama Supreme Court is the body that sets an execution date in the first place.

B. Madison files a petition for habeas corpus and receives a stay of execution.

Madison filed a habeas petition in federal court, raising the same claims he raised in the state court proceeding. *See* Doc. 1. The parties agreed that the habeas petition was governed by the deferential standard in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *See* Doc. 1 at 3; Principal Brief of Petitioner-Appellant, May 11, 2016, at 12–13. A habeas petitioner cannot obtain relief under AEDPA without showing that a state court's adjudication is "contrary to, or an unreasonable application of, clearly established law," or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The district court denied Madison's petition for writ of habeas corpus, finding that the state court's decision was not an unreasonable application of the law or facts. App. 67a. The district court explained that the state court had conducted a "fair hearing" where Madison presented evidence through his own

hired expert. App. 60a. The district court concluded that the "state court's determination was neither an unreasonable application of, nor contrary to, clearly established federal law." App. 66a. "It is apparent that the state court adjudication of these claims applied the relevant *Panetti/Ford* standard for determining competency to be executed, considered all of Madison's factual averments, and found that any dementia, and the alleged deficits in memory associated with that condition, did not prevent Madison from having a rational understanding of his execution and the reasons for his execution." App. 61a.

The Eleventh Circuit granted Madison a stay of execution and a certificate of appealability on the morning of the scheduled execution. App. 87a. The Commissioner asked this Court to vacate the stay of execution because Madison had not established a likelihood of success on his claim that he was incompetent to be executed. Four Justices—the Chief Justice, Justice Kennedy, Justice Thomas, and Justice Alito—voted to vacate the stay. App. 86a. There were only eight Justices serving on the Court at that time, and the Eleventh Circuit's stay of execution was undisturbed.

C. The court of appeals overrules the state court.

After full briefing and argument, a divided panel of the Eleventh Circuit reversed the district court and granted Madison's petition for writ of habeas corpus. App. 1a. Judges Martin and Wilson concluded that the state court both unreasonably determined the facts and unreasonably applied the law. *See* App. 19a, 25a.

Both of these conclusions stem from the majority's belief that an inmate cannot be executed if he does not remember or acknowledge committing murder.

First, the court of appeals rejected the state court's fact-finding that Madison had a rational understanding of why he was being executed. The problem with the state court's fact finding, according to the majority, was that "Dr. Kirkland's testimony is not relevant to the competency inquiry called for by the Supreme Court." App. 19a. This was so, the court reasoned, because "the record includes no indication that Dr. Kirkland assessed whether Mr. Madison could remember the crime." App. 20a. It was not relevant, according to the majority, that Dr. Kirkland "'testified that Mr. Madison 'was able to talk with me about very specific things that would indicate that he could remember specific things about the time of the offense." App. 20a-21a. According to the majority, Madison's ability to remember events before and after the offense does not show that he "can remember the event that matters here—his capital offense." App. 20a.

Second, the court of appeals held that the state court's decision involved an unreasonable application of clearly-established law. The problem, according to the two judges in the majority, is that the state court "never considered the impact of Mr. Madison's memory loss or his belief that he never killed anyone." App. 25a. According to the court of appeals, it is dispositive that Madison "isn't aware he committed the underlying crime—he doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone." App. 26a. "A person cannot rationally understand why he is being killed if, according to his 'concept of reality,' he never committed a crime." App. 27a. "A finding that a man with no memory of what

he did wrong has a rational understanding of why he is being put to death is patently unreasonable." App. 27a.

Judge Jordan dissented. App. 29a. He relied on the deferential standard of review that must be afforded to a state court's fact-findings under AEDPA. "I do not believe that Mr. Madison can overcome the presumption of correctness afforded to the state trial court's factual finding by clear and convincing evidence." App. 32a. "What matters here is that there is evidence in the record which supports a finding that Mr. Madison is competent." App. 35a. Specifically, Judge Jordan noted that the court's expert Dr. Kirkland found Madison to be competent after examining him and reviewing his medical records. App. 36a. Dr. Kirkland's conclusion was based on the fact that Madison has no "psychosis, paranoia, or delusion," remembers his trials and appeals in detail, and can discuss legal theories and other similar matters with his attorneys. App. 36a. Judge Jordan explained that "the state trial court considered but implicitly rejected Dr. Goff's [contrary] opinion." App. 37a.

REASONS THE COURT SHOULD GRANT THE WRIT

The Eleventh Circuit's decision to bar Madison's execution creates a circuit split and conflicts with numerous decisions of this Court. The Constitution prohibits "a State from carrying out a sentence of death upon a prisoner who is insane," *Ford*, 477 U.S. at 409–10, including one who "suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced." *Panetti*, 551 U.S. at 960. But this Court has expressly held that a State may execute

prisoners who "fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness." *Id.* at 959.

The Court should grant the writ and reverse, either summarily or after full briefing and argument. In this case, the experts agree that Madison is not delusional and that he understands the nature, cause, and consequences of his death sentence. That Madison claims he forgot the murder he committed—a murder for which he has never accepted responsibility—is not a legitimate reason to bar his execution. At the very least, the state court's decision to reject the testimony of Madison's hired expert was not objectively unreasonable under AEDPA.

I. The lower courts are split on whether a prisoner can be executed if he does not remember or otherwise acknowledge committing the murder.

The Eleventh Circuit's decision creates a clear split of authority on the question of whether a state can execute an inmate who does not remember or otherwise acknowledge committing murder. On one side of the split stands the Eleventh Circuit. On the other side stands the Sixth Circuit, the Fifth Circuit, and state supreme courts.

This Court's caselaw. This Court has addressed an inmate's competency to be executed two times. Each time, this Court focused on an inmate's *sanity*. It has never even suggested that a murderer cannot be executed because he forgot, or otherwise denies responsibility for, committing the murder for which he was convicted.

First, in *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court held that the Eighth Amendment prohibits a state "from inflicting the penalty of death upon a prisoner who is insane." *Id. at* 410 (plurality opinion). Concurring in *Ford*, Justice Powell declared that the Eighth Amendment "forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422 (Powell, J., concurring).

Second, in *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court rejected a lower court's rule that "foreclosed petitioner from establishing incompetency by . . . a showing that his mental illness obstructs a rational understanding of the State's reason for his execution." *Id.* at 959. There were two important caveats to the Court's holding. The Court conceded that "a concept like rational understanding is difficult to define" and, therefore, did not "attempt to set down a rule governing all competency determinations." *Id.* at 960-61. The Court also held that its rule did not apply to prisoners who "fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness." *Id.* at 959.

The Eleventh Circuit. In this case, the Eleventh Circuit misapplied *Ford* and *Panetti*. It held that a murderer cannot be executed unless he remembers or otherwise acknowledges committing the murder that led to his conviction. The court adopted that proposition as a bright-line rule: "[a] finding that a man with no memory of what he did wrong has a rational understanding of why he is being put to death is patently unreasonable." *Id.* at 1188-89. According to the Eleventh Circuit, a person cannot be executed if he "doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone." App.

26a. The Eleventh Circuit held that this principle was "clearly established" by this Court's precedents such that it applies even under AEDPA. And it rejected the state court's fact-finding because the state court's appointed expert never "assessed whether Mr. Madison could remember the crime." App. 19a. The Eleventh Circuit barred Madison's execution.

The Sixth Circuit. The Sixth Circuit has adopted precisely the opposite rule. Whereas the Eleventh Circuit believes an inmate's memory and acknowledgement of the crime is dispositive, the Sixth Circuit believes it is irrelevant. In *Bedford v. Bobby*, 645 F.3d 372, 374-75, 378 (CA6 2011), an inmate filed a petition for habeas corpus, claiming that he was not competent to be executed because he did not remember the murder. There, as here, the inmate's expert testified that his "condition ha[d] ... deteriorated ... with the onset of . . . dementia," his "memory [wa]s severely impaired," and he "lack[ed] intact memories of events and easily confuse[d] memories he does have or that others attempt to remind him about." *Id.* at 378.

The district court granted the prisoner's motion for a stay of execution, but the Sixth Circuit reversed. *Id.* at 380. The Sixth Circuit held that the inmate's claim had no chance of success on the merits. The Sixth Circuit reasoned that, "even on their own terms," the expert's conclusions about the inmate's lack of memory "do not establish that [he] does not understand the reasons for his conviction or the nature of his punishment, much less make it unreasonable to conclude to the contrary (as the state courts did)." *Id.* Instead, the Sixth Circuit correctly explained that the "Supreme Court has never held, much less suggested, that the failure to recall precise facts of an offense amounts to the kind of incompetence that prohibits the execution

of a defendant." *Id.* at 378-79. This Court denied the inmate's request to stay his execution, and he was executed that same day. *See Bedford v. Bobby*, No. 10A1117 (U.S. May 17, 2011); *Ohio Man Executed for Double Murder He Doesn't Remember*, Daily Mail (May 17, 2011).[1]

The Fifth Circuit. The Fifth Circuit has also rejected an incompetence claim based on purported amnesia. In *Simon v. Fisher*, 641 F. App'x 386, 386-87 (CA5 2016), an inmate alleged that he was incompetent to be executed because he suffered significant memory loss from a head injury. *Id.* The inmate's expert opined that the inmate suffered from "global amnesia" and had "essentially lost his identity in his amnesia"; the state's expert testified that the petitioner was malingering his memory loss. *Id.* at 387-88. Citing the Sixth Circuit, the district court held "that Simon's purported inability to recall that he committed several murders and was sentenced to death is, standing alone, insufficient to constitutionally restrict his death sentence." *Simon v. McCarty*, No. 2:11-CV-111-SA, 2014 WL 7338860, at *34 (N.D. Miss. Dec. 22, 2014). The Fifth Circuit affirmed the district court's competency decision because it "rest[ed] on an evaluation of conflicting expert opinions." 641 F. App'x at 389-90. Although the court's discussion focused on allegations that the petitioner was malingering his memory loss, the Fifth Circuit also quoted the Sixth Circuit's holding that "[t]he Supreme Court has never held, much less suggested, that the failure to recall precise facts of an offense amounts to the kind of in-

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[1] http://www.dailymail.co.uk/news/article-1388091/Ohio-man-Daniel-Lee-Bedford-executed-double-murder-doesnt-remember.html (last visited July 27, 2017)

competence that prohibits the execution of a defendant." *Id.* at 389. This Court denied certiorari earlier this year. *See* 137 S. Ct. 626 (Jan. 9, 2017).

Although *Simon* is unpublished, it is nonetheless important for two reasons. First, because of the time pressures of a pending execution, most litigation about competency to be executed is resolved by unpublished opinions. Second, the psychologist who opined that Simon suffered from "global amnesia" was the same psychologist who testified that Madison could not remember his crimes—Dr. John Goff. *See Simon*, 2014 WL 7338860 at *17 (summarizing Goff's conclusions). The Fifth Circuit properly allowed the district court in *Simon* to disbelieve Dr. Goff even though AEDPA played no role in that case; the Eleventh Circuit improperly disallowed the state court from doing the same thing here even though AEDPA imposes a more highly deferential standard of review. *See* App. 37a (Jordan, J., dissenting) ("the state trial court considered but implicitly rejected Dr. Goff's opinion").

State supreme courts. State supreme courts have likewise held that an inmate may be executed in circumstances like these.

In *State v. Irick*, 320 S.W.3d 284, 286 (Tenn. 2010), the Tennessee Supreme Court held that an inmate could be executed even though he purportedly forgot the murder. There, the inmate argued that he could not be executed because, among other things, he "has no memory of the events surrounding the murder." *Id.* at 296. The inmate's expert concluded that the inmate's "expressed inability to remember the offense was genuine." *Id.* at 289. The state's expert agreed that his memory problems were genuine, but testified

that they were not "outside the range of age-related memory decline." *Id.* at 291. Ultimately, the court rejected the inmate's competency claim because, just like Madison, he understood "that he has been convicted of murdering the victim," understood that he was "scheduled to be executed for this crime," and did not "manifest any symptoms of formal thought disorder, hallucinations, or delusions." *Id.* at 295-96.

Similarly, in *State ex rel. Middleton v. Terry Russell*, 435 S.W.3d 83 (Mo. 2014), the Supreme Court of Missouri held that a prisoner could be executed even though delusions caused him to believe that he did not commit a murder. A psychologist testified that the prisoner had a "psychotic mental illness" that led him to believe "his conviction was the result of a conspiracy." *Id.* at 84. The court held that this kind of mental problem was not the lack of rational understanding contemplated in *Panetti*: "Middleton plainly understands he is to be executed as punishment because he was found guilty of murdering his three victims; he simply believes he should not have been convicted." *Id.* at 85. This Court denied a stay of execution. *See Middleton v. Russell*, No. 14A64 (July 16, 2014). The Missouri Supreme Court continues to apply this rule in other cases. *See State ex rel. Clayton v. Griffith*, 457 S.W.3d 735, 745 (Mo. 2015) ("neither the fact that Clayton believes he should not have been convicted nor the fact that he believes he will be spared execution are sufficient to make a threshold showing that he is incompetent"), *cert. denied* 135 S.Ct. 1697 (2015).

This split of authority compels certiorari review. As this Court's docket reflects, states in the Eleventh,

Sixth, and Fifth Circuits conduct the majority of executions in this country.[2] And states that actually conduct executions are the only states in which the competency issue can be raised. *E.g. Stewart v. Martinez-Villareal*, 523 U.S. 637, 644–45 (1998) ("because his execution was not imminent . . . his competency to be executed could not be determined at that time"). If Madison had litigated this issue in Ohio, instead of Alabama, he would have been executed on May 12, 2016.

II. The court of appeals' decision is contrary to this Court's precedents.

Not only does the decision below create a split, it is also a demonstrably incorrect application of this Court's precedents. "It is settled that a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013). The ruling must be "objectively unreasonable, not merely wrong; even clear error will not suffice."

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[2] The Court allowed an execution to proceed in the Sixth Circuit the week before this petition was filed. *See Phillips v Jenkins*, 17A105 (July 25, 2017). Over the last two Terms, this Court has allowed 12 executions to proceed in the Eleventh Circuit alone. *See Melson v. Dunn*, 16A1212 (June 8, 2017); *Arthur v. Dunn*, 16A1161 (May 25, 2017); *Ledford v. Dozier*, 16A1118 (May 16, 2017); *Smith v. Alabama*, 16A569 (Nov. 22, 2016); *Lawler v. Sellers*, 16A390 (Oct. 19, 2016); *Terrell v. Bryson*, 15A606 (Dec. 8, 2015); *Bolin v. Jones*, 15-7662 (Jan. 7, 2016); *Jones v. Bryson*, 15A800 (Feb. 2, 2016); *Hittson v. Chatman*, 15A857 (Feb. 17, 2016); *Bishop v. Chatman*, 15A1012 (March 31, 2016); *In re Kenneth Fults*, 15A1033 (April 12, 2016); *Daniel v. Chatman*, 15A1116 (April 27, 2016).

Woods v. Donald, 135 S.Ct. 1372, 1376 (2015) (per curiam). Likewise, when evaluating factual determinations, AEDPA "requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'" *Schriro v. Landrigan*, 550 U.S. 465, 473–74 (2007) (quoting 28 U.S.C. § 2254(e)). This is "meant to be" a difficult standard to meet. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Eleventh Circuit purported to apply this deferential standard, but it obviously did not.

A. A prisoner's failure to remember or acknowledge his crime does not render him incompetent to be executed.

This Court has never held that the Constitution bars an execution if the murderer "doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone." App. 26a. Instead, all of this Court's competency cases are about "the prohibition against executing a prisoner *who has lost his sanity*." *Panetti*, 551 U.S. at 958 (emphasis added). With respect to other allegations of incompetence, the Court has declined to "attempt to set down a rule." *Id.* at 959. Moreover, the Court has held that a state may execute prisoners who "fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness," such as a "misanthropic personality or an amoral character." *Id.*

1. The absence of any holding from this Court is dispositive under AEDPA. By applying a rule that this Court has never adopted, the court of appeals committed the same error that led this Court to

reverse the lower courts in *White v. Woodall*, 134 S.Ct. 1697 (2014), and in *Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017).

In *Woodall*, as here, the court of appeals granted a habeas petition in a capital case. The court held that the Constitution required a "no-adverse inference instruction" when a defendant declined to testify at the penalty phase of his capital trial. *Woodall*, 134 S.Ct. at 1703. In reversing, this Court explained that its cases had left "open the possibility that some inferences might permissibly be drawn from a defendant's penalty-phase silence." *Id.* Although there were "reasonable arguments" that these precedents should be extended to require a "no-adverse inference instruction" at the penalty phase of trial, the Court held that a federal court may not extend this Court's precedents to their "logical next step" in a habeas case. *Id.* at 1706.

Similarly, a few months ago in *Virginia v. LeBlanc*, the Court summarily reversed the lower court's application of *Graham v. Florida*, 560 U.S. 48 (2010), in a habeas case. In *Graham*, the Court held that life-without-parole sentences may not imposed on non-murderer juvenile offenders. In *LeBlanc*, the court of appeals determined that a state court unreasonably relied on the availability of a "geriatric release program" to satisfy *Graham*'s requirement that juvenile offenders have an opportunity for parole. 137 S.Ct. at 1728. This Court summarily reversed the court of appeals because "*Graham* did not decide that a geriatric release program like Virginia's failed to satisfy the Eighth Amendment because that question was not presented." *Id.*

The Court should reverse the court of appeals for the same reasons it reversed in *Woodall* and *LeBlanc*. As in *Leblanc*, the Court has never addressed the issue here: whether a murderer can be executed if he "believes, to the best of his ability, he has never killed anyone." App. 26a. Instead, as in *Woodall*, the Court has left the question open. The Court intentionally declined to "attempt to set down a rule" governing claims of incompetence "other than those stemming from a severe mental illness." *Panetti*, 551 U.S. at 959. A federal court cannot create a new rule in an AEDPA case, but that is precisely what the Eleventh Circuit did here.

2. Even apart from AEDPA, however, the court of appeals' rule would be wrong. A murderer's purported inability to remember his crime does not undermine his "recognition of the severity of the offense" or the community's interest in "affirm[ing] its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed." *Panetti*, 551 U.S. at 958-59. "[E]veryone is amnesic to some degree" because "every individual's memory process is marked by some distortion." *Note, Amnesia: A Case Study in the Limits of Particular Justice*, 71 Yale L. J. 109, 109-10 (1961). But such memory problems do not stop us from having a rational understanding of our past. Adults do not independently remember every bad act they committed as a child, but they can rationally understand that they were responsible for them, acknowledge why they were punished, and feel remorse for their wrongdoing.

For their part, the relevant professional associations have adopted standards that focus on psychosis, not memory. The American Bar Association does not address "memory" in its standard for competence to be

executed. That standard instead provides that a "convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceeding, what he or she was tried for, the reason for the punishment or the nature of the punishment." Am. Bar Assoc. Crim. Just. Mental Health Stds., Std. 7-5.6(b).[3] Like the ABA, the American Psychiatric Association and the American Psychological Association are concerned about inmates with "profound deficiencies in understanding" that are "associated with mental retardation and with delusional beliefs." *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668, 676 (2006). These organizations believe an inmate is competent to be executed if he has "a meaningful understanding that the state is taking his life in order to hold him accountable for taking the life of one or more people." *Id.*

Lastly, there are significant practical problems with the Eleventh Circuit's holding that amnesia is a bar to execution. In particular, "false pleas of amnesia by criminal defendants are both common and difficult to detect." *Price v. Thurmer*, 637 F.3d 831, 834 (CA7 2011) (citing Marko Jelicic, Harald Merckelbach & Saskia van Bergen, "Symptom Validity Testing of Feigned Amnesia for a Mock Crime," 19 Archives of Clinical Neuropsychology 525 (2004)). Although there are tests for detecting false claims of amnesia, "'there is still ... no 'gold standard' measure for distinguishing between cases of genuine and feigned amnesia.'" *Id.*

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[3] http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html (last visited July 31, 2017)

(quoting Xue Sun et al., "Does Feigning Amnesia Impair Subsequent Recall?," 37 Memory & Cognition 81 (2009)).

B. The state court was not objectively unreasonable when it found that Madison was competent to be executed.

As Judge Jordan explains in dissent, the majority's decision to reject the state court's fact-finding is even more egregious than its conclusion that the state court made a legal error. "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841 (2010). Instead, the prisoner bears the burden of rebutting the state court's factual findings by clear and convincing evidence. *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013).

The court of appeals erroneously rejected the state court's fact-finding for two reasons. Both are based on the Eleventh Circuit's conclusion that a prisoner may not be executed if he does not remember or otherwise acknowledge committing murder.

First, the court of appeals incorrectly held that Dr. Kirkland's opinion was irrelevant because he never asked Madison if he could remember the crime. But, because this Court has never held that an inmate's lack of memory bars an execution, it is simply not true that Dr. Kirkland's "testimony is not relevant to the competency inquiry called for by the Supreme Court" or that Dr. Kirkland "simply wasn't looking at the right issues." App. 20a-21a. *See* also App. 19a (complaining that Dr. Kirkland never "assessed whether Mr. Madison could remember the crime"). Dr. Kirkland reviewed Madison's medical records, consulted

his treating physicians, and interviewed him about his understanding of the case and the pending execution. Dr. Kirkland concluded that Madison was not suffering from psychosis or delusions and understood that he was being executed for murder. Even Dr. Goff admitted that Madison "understands the sentence" and that the state is "seeking retribution." Doc. 8-3, Tab R-14 at 18; Doc. 8-1, Tab R-9 at 65. These are relevant considerations in determining whether a prisoner has a rational understanding of his punishment. *See* Am. Bar Assoc. Crim. Just. Mental Health Stds., Std. 7-5.6(b).[4]

Second, the court of appeals was wrong that "it is uncontroverted that, due to his mental condition, Mr. Madison has no memory of his capital offense." App. 19a. Although no one disputes that Madison has experienced cognitive decline over the years, Madison did not testify. Instead, the only evidence in the record for Madison's selective amnesia is the testimony of Dr. Goff, which the state trial court declined to credit and which merely vouched for Madison's own self-serving statements. When Dr. Goff made his assessment, he did not even know that Madison has always refused to take responsibility for committing the murder. Perhaps for these reasons, among others, "the state trial court considered but implicitly rejected Dr. Goff's" testimony. App. 37a (Jordan, J., dissenting).

Moreover, Dr. Kirkland's testimony undermined Madison's claim of amnesia. As the Eleventh Circuit noted, Dr. Kirkland testified that Madison "was able

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[4] http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html (last visited July 31, 2017)

to talk with me about very specific things that would indicate he could remember specific things about the time of the offense." App. 20a. That Madison admits to remembering events around the murder—and other violent crimes that he has committed—obviously weakens his assertion that he cannot remember the murder itself. Other than this kind of circumstantial evidence, the only way for the Commissioner to challenge Madison's claim of amnesia would be for Madison to admit that he committed the murder and can remember it. But the state courts should not have to take a condemned murderer at his word that he has selective amnesia. *See Price*, 637 F.3d at 834 (for amnesia to "operate as a defense to competence to stand trial . . . something more than the defendant's word would have to be shown, given the ease of making such a claim, the difficulty of countering it, and hence the temptation to abuse it"). As Judge Jordan concluded in dissent, the state court was within its rights to find Madison competent to be executed.

III. The case is a good vehicle for summary reversal or plenary review.

This case is a good candidate for summary reversal or plenary review. As explained above, the court of appeals' decision creates a split of authority and contradicts this Court's caselaw. Other considerations also underscore that the Court should grant the writ.

First, the Court is already familiar with this case. Last year, after the Eleventh Circuit stayed Madison's execution, four members of the Court voted to vacate that stay, presumably concluding that Madison could not establish a substantial likelihood of success. App. 86a.

Second, this case comes to the court after a full review in the lower courts, which is unusual for a claim about an inmate's competency to be executed. Most litigation about an inmate's competency to be executed occurs on an expedited basis and, when a motion to stay execution is denied, the case is over. Because the court of appeals (erroneously) granted a stay of execution in this case, the Court can address the question presented in a full and orderly manner based on a published panel opinion with a dissent.

Third, the Court should answer this question now so that it does not have to answer it through ad hoc motions to stay execution. If the Court does not take this case, the Court will need to decide whether to grant stays of execution for prisoners who refuse to acknowledge committing murder but who were tried outside of the Eleventh Circuit. The Court's rulings on those motions will, as a practical matter, answer the question for the inmate involved. *See Bedford v. Bobby*, No. 10A1117 (U.S. May 17, 2011) (denying stay of execution). But that is not the best or fairest way to adjudicate a legal issue.

Fourth, although only a few circuits are responsible for the split at issue here, those circuits are the ones that matter. States in the Eleventh, Sixth, and Fifth Circuits have been responsible for the majority of executions over the last few years. Because the Eleventh Circuit's decision reverses a state court on habeas review, state courts in Alabama, Georgia, and Florida are, as a practical matter, bound to follow it.

Fifth, this case has consumed enormous state resources. Madison has been tried and convicted three times for this murder. He has been through the full

gamut of post-conviction review with attendant appeals. The district court held an evidentiary hearing on Madison's initial habeas petition. The state court appointed its own expert to review Madison's competency and held a hearing on that claim as well. The Eleventh Circuit's decision "frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights" and "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington*, 131 S. Ct. at 786.

CONCLUSION

The Court should grant certiorari and reverse the court of appeals.

Respectfully submitted,

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August 2, 2017

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-12279

D.C. Docket No. 1:16-cv-00191-KD-M

VERNON MADISON,

Petitioner–Appellant,

versus

COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS,

Respondent–Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

(March 15, 2017)

Before WILSON, MARTIN, and JORDAN, Circuit Judges.

MARTIN, Circuit Judge:

Thirty years ago, the Supreme Court held that the Eighth Amendment prohibits the execution of a

person who is incompetent.[1] Ford v. Wainwright, 477 U.S. 399, 409–10, 106 S. Ct. 2595, 2602 (1986). The Court has since clarified that a person cannot be executed if he lacks a "rational understanding" of the reason for his execution. Panetti v. Quarterman, 551 U.S. 930, 954–60, 127 S. Ct. 2842, 2859–62 (2007). This standard requires the prisoner to be able to rationally understand the connection between the crime he committed and the punishment he is to receive. See Ferguson v. Sec'y, Florida Dep't of Corr., 716 F.3d 1315, 1336 (11th Cir. 2013). The Supreme Court told us that if the prisoner does not understand this connection, "the punishment can serve no proper purpose" and cannot be carried out. Panetti, 551 U.S. at 960, 127 S. Ct. at 2862.

This habeas petitioner, Vernon Madison, is a 66-year-old man on death row for the murder of a police officer over three decades ago. In recent years, Mr. Madison has suffered strokes resulting in significant cognitive and physical decline. His lawyers argue here that he is mentally incompetent to be executed under Ford and Panetti. Finding that Mr. Madison had made a substantial threshold showing of incompetency, an Alabama trial court held a competency hearing. At the hearing, Mr. Madison presented unrebutted testimony from Dr. John Goff that his strokes caused major vascular disorder (also known as vascular dementia) and related memory impairments and that, as a result, he has no memory of committing the murder—the very act that is the

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[1] While the Court used the term "insane" in Ford, post-Ford decisions identify the issue as "competency to be executed." E.g., Herrera v. Collins, 506 U.S. 390, 439, 113 S. Ct. 853, 881 (1993).

reason for his execution. To the contrary, Mr. Madison does not believe he ever killed anyone. Dr. Goff testified that due to his memory impairments, Mr. Madison does not have a rational understanding of why the state is seeking to execute him. The State presented expert testimony from Dr. Karl Kirkland. Dr. Kirkland testified that Mr. Madison was able to accurately discuss his legal appeals and legal theories with his attorneys and—on pretty much this basis alone—concluded that Mr. Madison has "a rational understanding of [his] sentence." Accepting the testimony of Dr. Kirkland, the Alabama trial court decided that Mr. Madison is competent to be executed. Mr. Madison argues that the trial court's decision relied on an unreasonable determination of the facts and involved an unreasonable application of the law. We agree.

In so holding, we are mindful of the great deference due to state court decisions on federal habeas review, particularly when the state court is applying a general standard like the one in Panetti. See Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 786 (2011) ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." (quotation omitted)). But "even a general standard may be applied in an unreasonable manner." Panetti, 551 U.S. at 953, 127 S. Ct. at 2858. Panetti may set out a general standard for competency, but the focus of the inquiry is clear. Panetti doesn't ask whether the prisoner can talk about the history of his case or legal theories with his attorneys. Instead, Panetti requires courts to look at whether the prisoner is able to rationally understand the connection between the crime he committed and the punishment he is to receive. See

Panetti, 551 U.S. at 960, 127 S. Ct. at 2862. One of the experts testified that due to a mental disorder, Mr. Madison was not able to make this connection. The other expert never addressed this question at all. This record is therefore wholly insufficient to support the trial court's decision. We conclude that the state court's decision that Mr. Madison is competent to be executed rested on an unreasonable determination of the facts and involved an unreasonable application of Panetti. We therefore reverse the District Court's denial of habeas relief.

I. BACKGROUND AND PROCEDURAL HISTORY

Mr. Madison has been tried three times for killing a police officer in 1985. Madison v. State, 718 So.2d 90, 94 (Ala. Crim. App. 1997). His first two convictions were reversed. At his third trial, the jury found Mr. Madison guilty of capital murder and recommended a life sentence by an 8-4 vote. See id. The trial judge overrode the jury's recommendation and sentenced Mr. Madison to death. Id. His conviction and sentence were affirmed by the Alabama Court of Criminal Appeals, id. at 104, and the Alabama Supreme Court. Ex parte Madison, 718 So.2d 104, 108 (Ala. 1998).

In February 2016, following the denial of state and federal habeas relief, Mr. Madison filed a petition for suspension of his death sentence in the Circuit Court of Mobile County, Alabama, arguing that he was incompetent to be executed under Ford and Alabama law. See Ala. Code § 15-16-23 (providing that the trial court shall suspend the execution of a death sentence if "it is made to appear to the satisfaction of the trial court that the

[prisoner] is then insane"). The Alabama trial court found that Mr. Madison had made a preliminary showing of incompetency, ordered that Mr. Madison be evaluated by a court-appointed expert, and scheduled a competency hearing. At the competency hearing, the court heard testimony from the court-appointed expert as well as Mr. Madison's expert. The court issued an order on April 29, 2016, finding that Mr. Madison was competent to be executed. Under state law, this ruling is not subject to review by any other Alabama court. See Ala. Code § 15-16-23.

Mr. Madison then filed a motion for a stay of execution and a petition for federal habeas relief in the U.S. District Court. The District Court found that Mr. Madison had exhausted his Ford claim, but it denied relief on the merits.[2] Mr. Madison appealed, and we granted Mr. Madison's motion for a certificate of appealability, stayed his execution, and ordered expedited briefing on the merits of his Ford claim.

II. FACTS

A. MR. MADISON'S CURRENT MEDICAL CONDITION

Mr. Madison, who is 66 years old, has a history of physical and mental impairments. He is legally blind, cannot walk independently, is incontinent, and has slurred speech. He has also suffered at

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[2] Although this is Mr. Madison's second federal habeas petition, it is not barred as "second or successive" under 28 U.S.C. § 2244(b) because his Ford claim did not become ripe until his execution was imminent. See Panetti, 551 U.S. at 945–47, 127 S. Ct. at 2853–55.

least two recent strokes—one in May 2015 and another in January 2016.[3] The May 2015 stroke was severe, and affected Mr. Madison's vision while also causing a substantial deficit in motor coordination. After this stroke, he showed signs of memory loss, repeatedly asking that his mother be informed that he had a stroke despite the fact that she had passed away several years earlier. On January 4, 2016, Mr. Madison had another stroke. He was found in his prison cell, unresponsive and incontinent. Medical records document that Mr. Madison was in an altered mental status after the January 2016 stroke. He appeared "very confused" and disoriented, and he exhibited signs of memory loss.

Following these strokes, Mr. Madison's legal team noticed a significant decline in his mental status, including memory loss, difficulty communicating, and profound disorientation and confusion. Mr. Madison reported frequently urinating on himself because "no one will let me out to use the bathroom," although he has a toilet in his cell. And Mr. Madison told his attorney during a visit in February 2016 that he planned to move to Florida after his release from prison. As a result, Mr. Madison's attorneys requested—and the Alabama trial court granted—a hearing to determine whether Mr. Madison is competent to be executed.

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[3] The record indicates that Mr. Madison likely suffered other strokes before May 2015.

B. THE STATE COURT COMPETENCY HEARING

Before the hearing, Mr. Madison was evaluated by Dr. Kirkland, the court-appointed psychologist, and Dr. Goff, a neuropsychologist retained by Mr. Madison's counsel. Both experts reviewed Mr. Madison's medical records and examined him. Both experts testified at the hearing and prepared written reports that were admitted into evidence.

1. The Expert Reports

In his report, Dr. Kirkland acknowledged that Mr. Madison's strokes had caused significant physical and cognitive decline and found no indication of malingering. Despite this decline, Dr. Kirkland found that Mr. Madison was able to accurately describe the history of his case regarding his appeals and was aware that the trial judge had overridden the jury's life sentence. Dr. Kirkland also noted that Mr. Madison could discuss details from his youth, such as where he attended elementary and high school. The report concluded that "Mr. Madison appears to be able to have a rational understanding of the sentence, the results or effects of the sentence, and to still be able to discuss defense and legal theories with his attorneys."

Dr. Goff's report also concluded that Mr. Madison had suffered "significant cognitive decline" due to his strokes and that there was no clinical indication of malingering. He administered the fourth edition of the Weschsler Adult Intelligence Scale (WAIS-IV) and calculated a General Ability Index of 72, which

falls within the borderline range of intelligence.[4] According to Dr. Goff's report, this score marked a very significant decline from Mr. Madison's previous levels of function. The report explained that Mr. Madison's Working Memory Index of 58 reflected "a very substantial deficit" in regard to working memory and that Mr. Madison had "a significant cognitive deficit."[5]

Dr. Goff diagnosed Mr. Madison with major vascular neurological disorder (vascular dementia) and reported that Madison suffered from retrograde amnesia. As a result, Mr. Madison could not recall certain past events that happened before his January 2016 stroke. Dr. Goff's report explained that if Mr. Madison was told a fact or a series of facts he might be able to recall this new information, but he would not be able to recall any memories affected by the retrograde amnesia.

According to Dr. Goff, Mr. Madison didn't have an independent recollection of his crime or the identity of the victim. Dr. Goff reported:

> When [I] asked [Mr. Madison] where he was convicted from he said, "It must have been Mobile" although he seemed unsure. Again he was able to tell me that the crime "must have been a murder." He could not identify the name of the victim. . . . [H]e indicates that he does not believe that he

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[4] A full scale IQ score could not be calculated because Dr. Goff was unable to administer two subscales of the WAIS-IV due to Mr. Madison's vision problems.

[5] The Working Memory Index is scored on a scale like an IQ test, where the mean is 100 and the standardization is 15.

> ever killed anybody because, "I never went around killing folks."

The report noted that Mr. Madison was not able to tell Dr. Goff the sequence of events from the offense to his arrest to the trial or any related details. During the interview, Mr. Madison said that he had been told by others that he had three trials and that the judge had overridden the jury's life sentence.

Dr. Goff reported that Mr. Madison understood the meaning of "execution" and "the idea of being dead." Dr. Goff concluded that Mr. Madison understood what he had been tried for but—because he could not remember the underlying crime and didn't believe he had ever killed anyone—"[h]e does not seem to understand the reasoning behind the current proceeding [his execution] as it applies to him."

2. The Evidentiary Hearing

Dr. Kirkland, Dr. Goff, and Mr. Madison's prison warden testified at the competency hearing. Dr. Kirkland emphasized Mr. Madison's ability to discuss the details of his legal appeals and the current status of his case. Dr. Kirkland also testified that Mr. Madison was aware of his execution. On redirect examination, Dr. Kirkland acknowledged that Mr. Madison's mental condition had significantly deteriorated, but he testified that Mr. Madison was able to talk "about very specific things that would indicate that he could remember specific things about the time of the offense." In response to the court's question of whether Mr. Madison understood that the state was seeking retribution for an act that he had committed, Dr. Kirkland replied:

"Certainly. [Mr. Madison] talked specifically about [a] death sentence versus life without [parole] in the original trial and the first retrial and in the second."

Dr. Goff's testimony at the evidentiary hearing largely followed his report. Dr. Goff testified that the stroke Mr. Madison suffered in January 2016 likely caused his memory problems. Dr. Goff described this event as a thalamic stroke— a type of stroke that commonly results in memory problems as well as other difficulties—and this conclusion was in keeping with an MRI report showing a "[t]iny focal acute to subacute infarct in the right thalamus." According to Dr. Goff, areas of Mr. Madison's brain have essentially died as a result of his strokes, and this is consistent with Mr. Madison's medical records.[6] It appeared to Dr. Goff that the basis of Mr. Madison's

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[6] The State suggests that Mr. Madison didn't really have a thalamic stroke, pointing to medical records indicating that Mr. Madison's January 2016 event was caused by drug use. While it's true there was some evidence of drug use, both experts agreed that Mr. Madison's cognitive decline resulted from strokes. And MRI imaging confirms that Mr. Madison had a "very small acute CVA" and a "new small right thalamic infarct." "CVA" stands for "cerebrovascular accident," which is also referred to as a stroke. See Medline Plus Medical Dictionary. http://c.merriam-webster.com/medlineplus/stroke (last visited October 13, 2016). An "infarct" refers to an area of dead tissue caused by a restriction in blood flow. See id., http://c.merriam-webster.com/medlineplus/infarct (last visited October 13, 2016). As Dr. Goff explained, an "infarct" is, in lay terms, a stroke. Mr. Madison's medical records also show that he has encephalomalacia, which refers to "softening of the brain due to degenerative changes in nervous tissue." See id., http://c.merriam-webster.com/medlineplus/encephalomalacia (last visited October 28, 2016). The medical records clearly establish that Mr. Madison had a stroke that affected his thalamus and that parts of his brain have died.

knowledge about his case was information he learned from his attorneys. Dr. Goff testified that Mr. Madison understood that the State was seeking retribution but didn't understand the past act for which he was being punished. Dr. Goff concluded that Mr. Madison understood he was being executed but—because he lacked memories of his past—didn't understand why.

3. Warden Davenport

The state called as a witness Warden Davenport, who had served the death warrant on Mr. Madison. Mr. Davenport testified that he read the court order setting the execution date to Mr. Madison and that Mr. Madison said "my lawyers are supposed to be handling that." The Warden also testified that prisoners are assigned mental health codes if they receive mental health care. According to Mr. Davenport, Mr. Madison's mental health code was zero, which indicates that Madison was not receiving treatment for a mental health condition.

C. THE ALABAMA COURT'S COMPETENCY DECISION

The Alabama trial court issued a written order in which it held that Mr. Madison was competent to be executed. The court identified Ford and Panetti as the relevant standards. It stated that the burden of proof was on Mr. Madison to show, by a preponderance of the evidence, "that [he] suffers from a mental illness which deprives [him] of the capacity to rationally understand that he is being executed as a punishment for a crime." The court's order summarized the evidence from the competency hearing, including the testimony of Dr. Kirkland and

Dr. Goff. It then found that Mr. Madison had failed to prove his incompetence by a preponderance of the evidence. The court "accept[ed]" the testimony of Dr. Kirkland regarding Mr. Madison's understanding of his execution. It found that Mr. Madison "has a rational[] understanding, as required by Panetti, that he is going to be executed because of the murder he committed and a rational[] understanding that the State is seeking retribution and that he will die when he is executed."

III. STANDARD OF REVIEW

This appeal is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[7] AEDPA imposes a

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[7] Mr. Madison argues that the lack of appellate review in Alabama state court for Ford claims precludes the application of AEDPA to his federal habeas petition. See Ala. Code § 15-16-23 (prohibiting appellate review of trial court's competency finding). Mr. Madison has good reason to be concerned about this. AEDPA severely limits the ability of federal courts to review state court decisions for constitutional error. As a result, state courts are the primary guardians of the constitutional rights of state prisoners. See Burt v. Titlow, 134 S. Ct. 10, 15-16 (2013) ("Recognizing the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong, AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court."). Alabama's statutory scheme relegates an important question—whether a person's impending execution is prohibited by the Constitution—to a single judge and makes that judge's determination unreviewable by the state's appellate courts. While we have concerns about a scheme that singles out one type of constitutional claim for less review (and consequently less protection) than other types of constitutional claims, we need not reach this issue because we conclude Mr. Madison is entitled to relief even under AEDPA's deferential standard of review.

"highly deferential standard for evaluating state-court rulings." Renico v. Lett, 559 U.S. 766, 773, 130 S. Ct. 1855, 1862 (2010) (quotation omitted). It bars federal courts from granting habeas relief on a claim that was adjudicated on the merits in state court unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Under § 2254(d)(1), "clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade, 538 U.S. 63, 71–72, 123 S. Ct. 1166, 1172 (2003). It "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523 (2000).

A state court decision is "contrary to" clearly established federal law if the state court applied "a rule different from the governing law set forth in [Supreme Court] cases, or if it decide[d] a case differently than [the Supreme Court] ha[s] done on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694, 122 S. Ct. 1843, 1850 (2002). A state court decision involves an "unreasonable application" of clearly established federal law if the state court (1) "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2)

"either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 529 U.S. at 407, 120 S. Ct. at 1520. The "unreasonable application" inquiry focuses on whether the state court's application of Supreme Court precedent was "objectively unreasonable," id. at 409, 120 S. Ct. at 1521, which "requires the state court decision to be more than incorrect or erroneous." Lockyer, 538 U.S. at 75, 123 S. Ct. at 1174.

We afford state court findings of fact "substantial deference." Brumfield v. Cain, 576 U.S. ___, 135 S. Ct. 2269, 2277 (2015). "[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 1041 (2003). A finding of fact is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." Wood v. Allen, 558 U.S. 290, 301, 130 S. Ct. 841, 849 (2010). Indeed, we presume that a state court's findings of fact are correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). But

> when a state court's adjudication of a habeas claim results in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding, this Court is not bound to defer to unreasonably-found

> facts or to the legal conclusions that flow from them.

Jones v. Walker, 540 F.3d 1277, 1288 n.5 (11th Cir. 2008) (en banc) (quotation omitted and alterations adopted). And we bear in mind that "[d]eference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." Miller-El, 537 U.S. at 340, 123 S. Ct. at 1041.

V. DISCUSSION[8]

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[8] In the District Court proceedings, the parties disputed whether Mr. Madison exhausted his Ford claim in state court. There, the State argued that Mr. Madison failed to exhaust because he did not appeal the trial court's decision to the Alabama Court of Criminal Appeals. The District Court found to the contrary that Mr. Madison had exhausted his claim. Although the State did not renew this exhaustion argument on appeal, and conceded at oral argument that it wasn't sure whether its position was even correct, we write to explain that the District Court got this right.

Section 15-16-23, which grants an Alabama trial court the authority to suspend a death sentence if the petitioner is incompetent to be executed, explicitly precludes review by any other judge or court. See Ala. Code § 15-16-23 ("This mode of suspending the execution of sentence after conviction on account of the insanity of the convict shall be exclusive and final and shall not be reviewed or revised by or renewed before any other court or judge."). The Alabama Court of Criminal Appeals has twice held that § 15-16-23 precludes appellate review of the trial court's competency determination, and these decisions have not been overruled. See Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995) (granting state's motion to dismiss appeal because Ala. Code § 15-16-23 "clearly states that a finding by the trial court on the issue of insanity, as it relates

A. THE COMPETENCY STANDARD

We begin our analysis with the Supreme Court precedent on the competency standard. In Ford, the Court held that the Eighth Amendment prohibits the state from executing a person who is incompetent. The plurality opinion reasoned that the Eighth Amendment prohibits execution of "one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." Ford, 477 U.S. at 417, 106 S. Ct at 2606. In a concurring opinion, Justice Powell concluded that the Eighth Amendment forbids the execution of "those who are unaware of the punishment they are about to suffer and why they are to suffer it" and requires that prisoners "know the fact of their impending execution and the reason for it." Id. at 422, 106 S. Ct. at 2608 (Powell, J., concurring). In Panetti, the Supreme Court revisited the competency standard and "clarified that the requisite 'awareness' or 'comprehension' required by Ford was tantamount to a 'rational understanding' of the connection between a prisoner's crimes and his execution." Ferguson, 716 F.3d at 1336 (citing Panetti, 551 U.S. at 935, 958–59, 127 S. Ct. at 2848, 2861–62). In sum, under Panetti and Ford the prisoner must rationally understand that he is going to be put to death and the reason why. See Ferguson, 716 F.3d at 1318.

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to this statute, is not reviewable by any other court"); Magwood v. State, 449 So. 2d 1267, 1268 (Ala. Crim. App. 1984) (concluding that it did not have jurisdiction over appeal under § 15-16-23 and declining to "creat[e] a right of appellate review contrary to the explicit language of the statute"). On this basis, we conclude that Mr. Madison properly exhausted the available state court remedies. See 28 U.S.C. § 2254(b)(1).

In Panetti, the Supreme Court rejected the "improperly restrictive" competency test articulated by the Fifth Circuit and held that a prisoner must rationally, as well as factually, understand the reasons for his execution. Panetti, 551 U.S. at 935, 959, 127 S. Ct. at 2848, 2862. The Fifth Circuit identified the relevant inquiry as whether a prisoner "is aware that he is going to be executed and why he is going to be executed." Id. at 956, 127 S. Ct. at 2860 (quotation omitted and alteration adopted). The Fifth Circuit concluded that a prisoner is competent if he is aware he committed a crime, that he will be executed, and that his crime is the stated reason for the execution. See id. The Supreme Court rejected this standard as inconsistent with Ford because it treated "a prisoner's delusional belief system as irrelevant if the prisoner knows that the State has identified his crimes as the reason for his execution." Id. at 958, 127 S. Ct. at 2861. The Court explained that a prisoner's mental condition is relevant to the requisite "comprehension" or "awareness" if it "so impair[s] the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution." Id. (alterations adopted).

Although Panetti identifies the concept of "rational understanding" as the focus of the competency inquiry, the Court's opinion does not define the term. See id. at 959, 127 S. Ct. at 2862. But while Panetti declined "to set down a rule governing all competency determinations," id. at 960–61, 127 S. Ct. at 2862, it did plainly tell us what is insufficient. Panetti explicitly rejected a bare factual-awareness standard, holding that "[a] prisoner's awareness of the State's rationale for an execution is not the same as a rational

understanding of it." Id. at 959, 127 S. Ct. at 2862. In other words, it's not enough for the prisoner to merely recite the proffered reason for his execution. Instead, Panetti tells us we must look at the prisoner's own "concept of reality," id. at 958, 127 S. Ct. at 2861—particularly as it relates to the relationship between his crime and his execution. See id. at 960, 127 S. Ct. at 2862 ("[A] severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose."). After Panetti, it's therefore clear that in order to determine competency, a court must examine whether a prisoner's mental condition prevents him from appreciating the link between his crime and his punishment.[9] See Panetti, 551 U.S. at 960–62, 127 S. Ct. at 2862–63; Ferguson, 716 F.3d at 1318 (stating that the analysis of "mental competency to be executed involves [the prisoner's] understanding of the connection between his

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[9] The rationales supporting the prohibition on the execution of people who are not competent underscore that the relevant inquiry focuses on the prisoner's subjective understanding of the reason for his execution. Justice Powell's opinion in Ford was concerned with the prisoner's capacity to experience retribution, 477 U.S. at 422, 106 S. Ct. at 2608 (Powell, J., concurring) ("If the [prisoner] perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied."), and the prisoner's ability "to prepare, mentally and spiritually, for [] death," id. at 421, 106 S. Ct. at 2607. The Ford majority spoke of the "fear and pain" that people who do not understand the reason for their execution face. Id. at 410, 106 S. Ct. at 2602. The Court explained that "civilized societies" feel "natural abhorrence" at killing people like this because they lack the "capacity to come to grips with [their] own conscience or deity." Id. at 409, 106 S. Ct. at 2601.

execution and the crimes for which he is going to be executed").

B. THE ALABAMA COURT UNREASONABLY DETERMINED THE FACTS

Mr. Madison argues that the state trial court's decision was based on an unreasonable determination of the facts because the court refused to consider undisputed evidence of his diagnosed dementia and corresponding memory deficits. Mr. Madison points out that the trial court's order never mentions his dementia diagnosis or engages in any analysis about how that diagnosis or his memory impairment impacts his ability to rationally understand the reason for his execution. The State responds that the trial court considered all of the evidence and simply relied on Dr. Kirkland's testimony to determine that Mr. Madison is competent. But our review of Dr. Kirkland's testimony leads us to conclude that it is insufficient to support the trial court's competency determination. Indeed, Dr. Kirkland's testimony is not relevant to the competency inquiry called for by the Supreme Court.

As we have discussed, Panetti requires a court to examine whether the prisoner, due to a mental disorder, lacks a rational understanding of the connection between his crime and his execution. The only evidence presented to the state court on this question was the testimony and reports of Dr. Kirkland and Dr. Goff. That evidence shows that Mr. Madison suffers from a serious mental disorder that has left him unable to recall his capital offense and that Mr. Madison believes, to the best of his ability, he didn't kill anyone.

First, it is clear that Mr. Madison has a serious mental condition. The experts agreed that Mr. Madison's strokes have impaired his cognitive functioning. Dr. Goff diagnosed Mr. Madison with a vascular neurological disorder (vascular dementia) characterized by retrograde amnesia. Dr. Kirkland did not dispute that diagnosis. The experts agreed there was no indication that Mr. Madison was malingering.

Second, on the record before us it is uncontroverted that, due to his mental condition, Mr. Madison has no memory of his capital offense. Dr. Goff specifically evaluated Mr. Madison's cognitive abilities, including his memory, and found that while Mr. Madison is able to remember certain things from his past, he has no memory of the murder. The State presented no evidence to rebut this finding. Indeed, the record includes no indication that Dr. Kirkland assessed whether Mr. Madison could remember the crime, and the State concedes that Dr. Kirkland never testified on this particular point. Rather, Dr. Kirkland testified that Mr. Madison "was able to talk with me about very specific things that would indicate that he could remember specific things about the time of the offense." (Emphasis added.) Dr. Kirkland's report reflected only that Mr. Madison was able to discuss certain details about his youth, such as where he attended elementary and high school, and the history of the litigation challenging his conviction and sentence. These statements do not show that Mr. Madison can remember the event that matters here—his capital offense. Dr. Goff's

testimony that Mr. Madison does not remember committing the murder is therefore unrefuted.[10]

Third, the record shows that, as a result of his mental disorder, Mr. Madison does not rationally understand the connection between his crime and his execution. Dr. Goff's evaluation focused on Mr. Madison's understanding of the reason for his execution, and Dr. Goff used a checklist of interview questions specifically designed to assess a prisoner's competency to be executed.[11] On the basis of this evaluation, Dr. Goff testified that Mr. Madison cannot remember the crime and doesn't believe he has killed anyone. Dr. Goff therefore concluded that Mr. Madison doesn't understand why he is going to be punished or the act for which he is to be punished. Dr. Goff's testimony addressed the core question

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[10] The state trial court made no explicit finding as to whether Mr. Madison could remember his offense. In any event, such a finding would not have been reasonable in light of the evidence presented at the state court proceeding because there was no testimony or evidence to support it.

[11] Dr. Goff used an interview checklist published in the Journal of Behavioral Sciences and the Law. See Zapf, P.A., Boccaccini, M.T., & Brodsky, S. L., Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist, 21 Behav. Sci. & L. 103 (2003). The checklist is divided into four sections: (1) understanding the reasons for punishment, (2) understanding the punishment, (3) appreciation and reasoning (in addition to simple factual understanding), and (4) ability to assist the attorney. Id. at 114. In his report, Dr. Goff noted that he attempted to complete the first section of the checklist, which focuses on the individual's understanding of the crime and other conviction-related information. Id.; see also id. at 117–18. Dr. Goff was not able to follow the suggested outline because of Mr. Madison's "tendency to repeat himself and his tendency to go off on tangents and start talking about other issues."

posed by Panetti—whether Mr. Madison rationally understands that his crime is the reason for his execution. In stark contrast, Dr. Kirkland's report and testimony include no indication that he evaluated whether Mr. Madison understood this connection at all.[12] Dr. Kirkland didn't refute any of Dr. Goff's conclusions. Instead, the conclusions in Dr. Kirkland's report appear to rely exclusively on Mr. Madison's ability to discuss the history of his case.

Dr. Kirkland's testimony at the competency hearing demonstrates that he simply wasn't looking at the right issues. Dr. Kirkland summarized his relevant findings as follows: First, "[Mr. Madison] was able to discuss his case with me in detail, in particular, each returned trip to [the sentencing] court"; and, second, "he was able to discuss the posture of the case at this point in an accurate fashion, and indicated that he knew what the original sentence was as well as why the case has been tried three times." But this evidence shows only that Mr. Madison understands the procedural history of his case and is aware that he has been sentenced to death. Demonstrating this distinction, when the trial court asked Dr. Kirkland whether Mr. Madison understood that the State was seeking retribution for an act Madison had committed in the past, Dr. Kirkland replied, "Certainly. [Mr. Madison] talked specifically about [a] death sentence versus life without [parole] in the original trial and the first retrial and in the second." That's all Dr. Kirkland

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[12] Although Dr. Kirkland has performed a significant number of competency evaluations in other contexts (e.g., competency to stand trial), Mr. Madison was the first prisoner he evaluated for his competency to be executed.

said. Mr. Madison's ability to distinguish between a death sentence and a life sentence does not show—or even suggest—that he understands that his death sentence means he will be put to death because of the crime he committed.

The critical fact underlying the state court's competency decision was that Mr. Madison rationally understands "that he is going to be executed because of the murder he committed." (Emphasis added.) But nothing in the record supports this finding.[13] Dr. Kirkland never testified that Mr. Madison understands that his execution is connected to the murder he committed. And none of Dr. Kirkland's testimony otherwise bears on Mr. Madison's ability to

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[13] The dissent says that Dr. Kirkland's testimony supports the state court's competency finding. We respectfully disagree. No testimony from Dr. Kirkland bears on Mr. Madison's ability to understand the connection between the murder he committed in 1985 and his execution. Dr. Kirkland's testimony that Mr. Madison understands his legal appeals and can discuss legal theories with his attorneys could perhaps demonstrate that Mr. Madison is competent to stand trial. See Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 903 (1975) (competency to stand trial requires that the defendant have "the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense"). But, as we've explained, it does not show that he is competent to be executed.

Although the dissent portrays the state court as reasonably choosing between two experts, this record does not contain conflicting expert testimony on the critical issue of whether Mr. Madison rationally understands the connection between the murder he committed and his execution. As a result, this is not a situation in which the state court simply credited one expert over another. Cf. Ferguson, 716 F.3d at 1339–40 (concluding that petitioner was not entitled to relief under § 2254(d), in part because the state court merely credited the testimony of some experts over others).

understand the connection between his past crime and his execution. The only evidence in the record that does address this issue demonstrates that, due to his serious mental disorder, Mr. Madison does not understand the connection between his crime and his execution. Dr. Goff's testimony showed that Mr. Madison cannot remember his crime, doesn't believe he committed murder, and therefore cannot rationally connect his crime to his execution. Dr. Kirkland didn't talk about Mr. Madison's ability to make this connection at all. As a result, the state court's finding that Mr. Madison "has a rational[] understanding . . . that he is going to be executed because of the murder he committed" is not supported by the record and is therefore plainly unreasonable.[14] See Burgess v. Comm'r, Ala. Dep't of Corr., 723 F.3d 1308, 1319 (11th Cir. 2013) (holding state court's ruling was an unreasonable determination of the facts because the record was "insufficient to support its conclusions"); Green v.

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[14] Although the Supreme Court has "not yet defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)," Brumfield, 135 S. Ct. at 2282 (quotation omitted), and neither has this Court, Landers v. Warden, Atty. Gen. of Ala., 776 F.3d 1288, 1293 n.4 (11th Cir. 2015) ("The interaction between [§ 2254](d)(2) and (e)(1) . . . is an open question in this circuit."), Mr. Madison has met his burden under either standard. Nothing in the record supports the state court's factual determination. And the unrebutted expert testimony on this point shows the exact opposite. We therefore conclude Mr. Madison has produced clear and convincing evidence that he does not rationally understand the connection between his past crime and his execution. See Ward v. Hall, 592 F.3d 1144, 1178 (11th Cir. 2010) (concluding habeas petitioner had rebutted the presumed correctness of the state court's factual finding when "there [was] no contrary evidence in the record to refute" the petitioner's evidence).

Nelson, 595 F.3d 1245, 1251 (11th Cir. 2010) (concluding the state court's determination had "no basis in th[e] record" and was therefore unreasonable under § 2254(d)(2)). We therefore conclude that the state court's decision that Mr. Madison is competent to be executed rests on an unreasonable determination of the facts.

C. THE ALABAMA COURT UNREASONABLY APPLIED THE LAW

This record also leads us to conclude that the state court's decision involved an unreasonable application of clearly established federal law. The state court cited Panetti in support of its finding that Mr. Madison was competent to be executed. But, considering the evidence presented at the competency hearing, this finding "cannot be reconciled" with any reasonable application of Panetti. 551 U.S. at 953, 127 S. Ct. at 2858.

The State argues that Mr. Madison cannot succeed under AEDPA because Ford and Panetti didn't hold that the specific mental conditions relevant here, dementia and related memory loss, "definitively preclude rational understanding." Rather, the State suggests that only a prisoner suffering from gross delusions can show incompetency under Panetti.[15] This is not consistent with our reading of Ford and Panetti. Neither case says a prisoner must suffer from delusions in order

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[15] At oral argument, the State argued that a prisoner who has severe dementia that doesn't result in delusions but has completely obliterated his memory would be competent to be executed because the mere fact that a prisoner doesn't suffer from delusions means that he can form the rational understanding required by Panetti.

to be deemed incompetent. Indeed, such a narrow and rigid rule would be inconsistent with the principles underlying those decisions. The Supreme Court was concerned with a much broader question. That is, whether a prisoner's "current mental state [] bar[s] his execution" under the Eighth Amendment, Panetti, 551 U.S. at 934, 127 S. Ct. at 2848, by preventing him from "comprehending the meaning and purpose of the punishment," id. at 960, 127 S. Ct. at 2862.

Panetti requires a court making a competency determination to analyze the prisoner's understanding of the connection between his crime and his execution. See Panetti, 551 U.S. at 960, 127 S. Ct. at 2862 (focusing on the prisoner's "awareness of a link between [his] crime and [his] punishment"); see also Ferguson, 716 F.3d at 1336. And the Supreme Court has told us that the prisoner's own "concept of reality" is relevant to this determination. See Panetti, 551 U.S. at 958–60, 127 S. Ct. at 2861–62. Courts may not conflate a prisoner's mere awareness of the stated reason for his execution with a rational understanding of that reason—"[a] prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." Id. at 959, 127 S. Ct. at 2862.

In short, the Supreme Court has made it clear that to determine competency, a court must examine the prisoner's understanding of the connection between his crime and his execution, taking into account any impairments resulting from a mental disorder. See Panetti, 551 U.S. at 958–60, 127 S. Ct. at 2861–62. The state court didn't do that here. The court never considered the impact of Mr. Madison's

memory loss or his belief that he never killed anyone on his ability to make the required connection between his crime and his execution. And the evidence the trial court did consider—namely, Dr. Kirkland's testimony—did not address Mr. Madison's understanding of this connection at all. Therefore, under any reasonable interpretation of Panetti, this record cannot support the trial court's finding that Mr. Madison is competent to be executed.

A closer look at the competency standard rejected by the Supreme Court in Panetti as "too restrictive" makes this obvious. Id. at 956, 127 S. Ct. at 2860. The Fifth Circuit's test before the Court in Panetti considered a prisoner competent if he was aware of committing the underlying crime, aware that he will be executed, and aware that the reason the state has given for his execution is the underlying crime. See id. But, even under this standard, Mr. Madison cannot be deemed competent. The record shows that, due to his dementia, he isn't aware that he committed the underlying crime—he doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone. Panetti clearly established that the Fifth Circuit's "bare and narrow factual-awareness" test was too restrictive, see Ferguson, 716 F.3d at 1335, so this trial court's determination that Mr. Madison is competent is wholly inconsistent with Panetti.

We are aware that the Supreme Court recognized "a concept like rational understanding is difficult to define." Panetti, 551 U.S. at 959, 127 S. Ct. at 2862. But Panetti plainly requires courts making competency determinations to analyze whether the prisoner understands "the connection between his

execution and the crimes for which he is going to be executed." Ferguson, 716 F.3d at 1318. The state court failed to do that here. If a court can find a prisoner competent to be executed without evidence that he understands why he is being punished, Panetti doesn't stand for much.

AEDPA requires us to ask whether "some fairminded jurists could agree," with the state court's competency determination in light of the Panetti standard and the evidence presented to the state court. See Ferguson, 716 F.3d at 1340 (quotation omitted). Given the unrebutted evidence that Mr. Madison suffers from vascular dementia, has no memory of his capital crime, was not malingering during the experts' evaluations, and believes that he has not killed anyone—as well as the utter lack of any testimony that Mr. Madison understands the connection between the murder he committed and his impending execution—the answer here is no. A person cannot rationally understand why he is being killed if, according to his "concept of reality," he never committed a crime. Panetti, 551 U.S. at 958, 127 S. Ct. at 2861. A finding that a man with no memory of what he did wrong has a rational understanding of why he is being put to death is patently unreasonable.

V. CONCLUSION

Because the Alabama trial court unreasonably determined the facts relevant to Mr. Madison's claim and unreasonably applied controlling federal law, we do not owe the state court's finding that Mr. Madison is competent to be executed deference under AEDPA. We therefore review the merits of Mr. Madison's claim de novo. See Adkins v. Warden, Holman CF,

710 F.3d 1241, 1255 (11th Cir. 2013); Cooper v. Sec'y, Dep't of Corr., 646 F.3d 1328, 1353 (11th Cir. 2011) .

Under Panetti there are two relevant questions. First, whether Mr. Madison rationally understands the connection between his crime and his execution—that is, whether he understands that he is going to be executed because of the murder he committed. Ferguson, 716 F.3d at 1342. And second, whether Mr. Madison understands that he will die when he is executed. Id. It is undisputed that Mr. Madison understands that his execution will result in his death. But for the second question, the evidence shows that, due to his dementia and related memory impairments, Mr. Madison lacks a rational understanding of the link between his crime and his execution. Mr. Madison may have been told that he is being executed because of the murder he committed, but he doesn't remember his capital offense, and according to his perception of reality he never committed murder. This record is without evidence that Mr. Madison is malingering, and there is no finding by the trial court to that effect. A person does not rationally understand his punishment if he is simply blindly accepting what he has been told. See Panetti, 551 U.S. at 959, 127 S. Ct. at 2862 ("A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it."); see also Ferguson, 716 F.3d at 1344 (Wilson, J., concurring) ("Panetti requires more than just a prisoner's ability to regurgitate the State's announced reason for his punishment or to recite the facts attendant to his execution."). Dr. Goff testified that Mr. Madison does not understand why he is being executed or the act for which he is being punished. None of the

evidence at the competency hearing belies Dr. Goff's testimony. We therefore conclude that Mr. Madison is incompetent to be executed.

REVERSED.

JORDAN, Circuit Judge, dissenting.

After reviewing the record, I believe that Vernon Madison is currently incompetent. I therefore do not think that Alabama can, consistent with the Constitution, execute him at this time for his murder of a police officer three decades ago. *See generally Panetti v. Quarterman*, 551 U.S. 930, 958 (2007) (explaining that a state cannot put to death a prisoner who "cannot reach a rational understanding of the reason for the execution"). But Congress has chosen to generally prohibit federal courts from adjudicating constitutional claims anew on habeas review, so Mr. Madison's competency (or lack thereof) is not our initial call to make. Under the restrictive standards we are required to apply, *see* 28 U.S.C. § 2254(d), and given the way we interpreted *Panetti* in *Ferguson v. Secretary*, 716 F.3d 1315 (11th Cir. 2013), I do not think Mr. Madison can obtain habeas relief.

I

Mr. Madison asserts that the state trial court's decision is not entitled to AEDPA deference because Alabama law does not provide for any appellate review. *See* Br. for Appellant at 20–26. But he did not present this theory to the district court, and normally we do not entertain arguments raised for the first time on appeal. *See, e.g., Landers v. Warden*, 776 F.3d 1288, 1296–97 (11th Cir. 2015). I understand that we have discretion to address an unpreserved claim, *see, e.g., Burns v. Secretary*, 720 F.3d 1296, 1303 n.2 (11th Cir. 2013) (citing cases), but I would not exercise such discretion here because Mr. Madison never sought a certificate of appealability on this issue.

II

Mr. Madison argues that the state trial court improperly applied a competency standard which required him to show that he suffered from a mental illness, and refused to consider his dementia and corresponding memory deficits. As a result, he says, the state trial court's decision was contrary to, and an unreasonable application of, *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti*. *See* Br. for Appellant at 26–31. I am not convinced by this argument.

First, the state trial court cited both *Ford* and *Panetti* in its order. And it correctly quoted *Panetti* for the proposition that "[a] prisoner's awareness of the [s]tate's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter." D.E. 8-2 at 4 (quoting *Panetti*, 551 U.S. at 959) (internal quotation marks omitted).

Second, although I strongly disagree with Alabama's contention that mental illness is a necessary (though not sufficient) prerequisite for a finding of incompetency under *Ford* and *Panetti*—I can imagine a number of scenarios where lack of competency is not due to mental illness—Mr. Madison told the state trial court at the evidentiary hearing that the applicable competency standard was the one approved in *Weeks v. Jones*, 52 F.3d 1559, 1568 (11th Cir. 1995), i.e., the standard found in Standard 7-5.6(b) of the American Bar Association's Criminal Justice Mental Health Standards (which itself refers to "mental illness"), as modified by *Panetti*. Mr. Madison explained the standard as follows:

> [T]his [c]ourt would have the obligation of determining whether Mr. Madison, *as a result of mental illness* or mental retardation, cannot understand the nature of the pending proceeding, what he . . . was tried for, the reason for the punishment, or the nature of the punishment. And I'm reading from *Weeks*. . . . The convict is also incompetent if, *as a result of mental illness* or retardation, the convict lacks sufficient capacity to recognize or understand any fact which may exist which would make the punishment unjust or lawful, or lacks the ability to convey such information to counsel or the [c]ourt. Obviously, there's the United States Supreme Court decision in *P[a]netti* as well, which describes the standard as one of having a rational understanding of the proceedings and not just a factual understanding of what's happening.

D.E. 8-1 at 7–8 (emphasis added). Because Mr. Madison urged the state trial court to use the *Weeks* standard, which referred to mental illness, he cannot now complain that it did as he asked. *See, e.g.*, *F.T.C. v. AbbVie Prod. LLC*, 713 F.3d 54, 65–66 (11th Cir. 2013) (concluding that party which argued for a certain standard in the district court invited error and could not request a different standard on appeal).

III

Mr. Madison contends that the state trial court erred in finding him competent to be executed. This

claim is a difficult one, but at the end of the day I do not believe that Mr. Madison can overcome the presumption of correctness afforded to the state trial court's factual finding by clear and convincing evidence.

A

A state can, consistent with the Due Process Clause of the Fourteenth Amendment, presume that a defendant is competent, and place the burden on him to show otherwise by a preponderance of the evidence. *See Medina v. California*, 505 U.S. 437, 446–53 (1992); *Cooper v. Oklahoma*, 517 U.S. 348, 355–56 (1996). Unfortunately, the Alabama statute at issue here, Ala. Code § 15-16-23, is silent on who has the burden of proof as to competency, and because the statute does not allow for appellate review of a trial court's competency ruling, *see, e.g.*, *Weeks v. State*, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995), there are no reported decisions in Alabama which address the burden of proof. Our cases involving § 15-16-23 are also silent on that issue. *See, e.g., Magwood v. Smith*, 791 F.2d 1438, 1445–47 (11th Cir. 1986).[1]

In its order, the state trial court explained that the parties had agreed that Mr. Madison had the burden of showing, by a preponderance of the

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[1] One of our opinions, *James v. Singletary*, 957 F.2d 1562, 1571 (11th Cir. 1992), says— without citing any authority—that a "petitioner raising a substantive claim of incompetency is entitled to no presumption of incompetency and must demonstrate his or incompetency by a preponderance of the evidence." This language, however, is dicta because the *James* panel only addressed whether the Florida petitioner in that case had done enough to obtain an evidentiary hearing in the district court.

evidence, that he is incompetent and cannot be executed. *See* D.E. 8-2 at 4. When he filed his habeas corpus petition, Mr. Madison did not take issue with the state trial court's statement. *See* D.E. 1 at 15–16. And in his brief here Mr. Madison does not quarrel with the state trial court's allocation of the burden of proof. It seems to me, therefore, that our § 2254(d)(2) analysis must proceed with the understanding that in the state trial court Mr. Madison bore the burden of establishing that he is incompetent. That necessarily means, of course, that Alabama did not have to establish that Mr. Madison is competent.[2]

B

The state trial court's determination that Mr. Madison is competent under *Panetti* constitutes a finding of fact. *See, e.g., Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (pre-AEDPA); *Lawrence v. Secretary*, 700 F.3d 464, 476–77 (11th Cir. 2012) (post-AEDPA). Under AEDPA that finding of fact is "presumed to be correct," and Mr. Madison shoulders the burden of rebutting that "presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Clear and convincing evidence, as we have explained, is "an intermediate standard

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[2] Some Alabama cases, in addressing competency to stand trial under Ala. Code § 15-16¬22, have explained that the defendant bears an initial burden of producing evidence that he is incompetent, but once he does so the state "must then prove that [he] is competent." *Lackey v. State*, 615 So. 2d 145, 152 (Ala. Crim. App. 1992). Mr. Madison has not tried to place the burden on Alabama even though dicta in *Magwood v. State*, 689 So. 2d 959, 973 (Ala. Crim. App. 1996), suggests that "[t]he standards and guidelines concerning [§ 15-16-23] are analogous to those concerning the determination of competence to stand trial established in § 15-16-22[.]"

of proof that lies between proof by a preponderance of the evidence and proof beyond a reasonable doubt." *Fults v. GDCP Warden*, 764 F.3d 1311, 1314 (11th Cir. 2014).

Significantly, we do not apply *Panetti* and *Ford* in a vaccum. In *Ferguson*, we explained that *Panetti*, though rejecting a "bare and narrow factual-awareness standard[,] . . . did not abrogate or otherwise reject the awareness standard articulated by Justice Powell [in *Ford*], nor did it impose a new, more rigorous standard for assessing competency to be executed." 716 F.3d at 1335. "Instead, the Supreme Court in *Panetti* generally accepted the proposition that *Ford* had laid down the 'substantive federal baseline for competency,' and it clarified that the requisite 'awareness' or 'comprehension' required by *Ford* was tantamount to a 'rational understanding' of the connection between a prisoner's crimes and his execution." *Id.* at 1335–36 (citation omitted). "What the Supreme Court rejected in *Panetti* was an overly narrow interpretation of *Ford* that deems a prisoner's mental illness and delusional beliefs irrelevant to whether he can understand the fact of his pending execution and the reason for it." *Id.* at 1336.

In *Ferguson* we also pointed out that *Panetti* declined to provide a definition of the phrase "rational understanding," except to say that "'normal' or 'rational' in this context does not mean what a layperson understands those terms to mean." *Id.* at 1337 (citation omitted). And "[b]ecause the Supreme Court refrained from clearly establishing in *Panetti* any definition of rational understanding," we said

that "state courts can hardly be faulted for not clearly defining it themselves." *Id.*

There is, undoubtedly, evidence in the record which shows that Mr. Madison—given his thalamic stroke, ensuing vascular dementia, and numerous other significant medical problems—is incompetent. Dr. John Goff, for example, concluded that Mr. Madison is not competent. Mr. Madison, according to Dr. Goff, does not remember who his victim was. *See* D.E. 8-1 at 59. And although Mr. Madison realizes that he is going to be executed, Dr. Goff believes that he does not understand why due to the loss of episodic (i.e., event-specific) memory. *See id.* at 48, 55. Dr. Goff reached his conclusion after examining Mr. Madison, administering a number of tests to him, interviewing other individuals who interacted with him, and reviewing his medical history. *See id.* at 40–53. I personally find Dr. Goff's opinion persuasive and would credit it if I were the factfinder, but that is not my role. *See Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.").[3]

What matters here is that there is evidence in the record which supports a finding that Mr. Madison is competent. Dr. Karl Kirkland, following an examination of Mr. Madison and a review of his

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[3] I do note, however, that Dr. Goff was not aware that Mr. Madison had never admitted that he was guilty of murder, and had tried to establish that he acted in self-defense. *See* D.E. 8¬1 at 65; *Madison v. State*, 718 So.2d 90, 97 (Ala. Crim. App. 1997).

medical records, concluded that he is competent despite a decline in cognitive functioning. *See* D.E. 8-1 at 17. As set forth in his report, which was admitted as Court Exhibit 1 at the state court evidentiary hearing, Dr. Kirkland reached his conclusion based on findings that Mr. Madison (a) does not have "psychosis, paranoia, or delusion;" (b) remembers his appeals and has a strong belief that his state trial judge should have recused himself; (c) understands the "exact posture of his case at this point;" (d) is "able to accurately discuss many aspects of his case;" and (e) "appears to be able to have a rational understanding of the sentence, the results or effects of the sentence, and to still be able to discuss defense and legal theories with his attorneys." D.E. 8-3 at 9–11. At the evidentiary hearing, Dr. Kirkland testified that Mr. Madison is "able to discuss the posture of the case at this point in an accurate fashion," and is "able to be cognizant, aware . . . where he is with the case." D.E. 8-1 at 16–17. He also explained that Mr. Madison knows about his pending execution, and realizes that he has two possible sentences: execution and life without parole. *Id.* at 23, 25–26.

The state trial court found, after considering the conflicting evidence, that Mr. Madison failed to prove by a preponderance of the evidence that he is incompetent. *See* D.E. 8-2 at 10. The state trial court accepted the testimony of Dr. Kirkland as to Mr. Madison's understanding of the situation, and specifically found that Mr. Madison "has a rational[ ] understanding, as required by *Panetti*, that he is going to be executed because of the murder he committed and a rational[ ] understanding that the

[s]tate is seeking retribution and that he will die when he is executed." *Id.*

I acknowledge that Dr. Kirkland may not have performed the most exhaustive of examinations, may not have asked the best questions, and may not have provided the most pristine opinion. But that is not dispositive because Alabama did not have the burden of proof. Given that Mr. Madison bore the burden of establishing his incompetency, and that the state trial court considered but implicitly rejected Dr. Goff's opinion, *see Hodges v. Attorney General*, 506 F.3d 1337, 1347 n.2 (11th Cir. 2007), I do not believe Mr. Madison can overcome the presumption of correctness given to that court's competency finding by clear and convincing evidence. *See Ferguson*, 716 F.3d at 1339–42; *Fults*, 764 F.3d at 1314, 1319–21. Stated differently, the state trial court's finding was not "objectively unreasonable in light of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).[4]

IV

Respectfully, and reluctantly, I dissent.

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[4] Things might be different if Alabama had the burden of demonstrating that Mr. Madison is competent. But, as the case was litigated in the state court, it did not.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VERNON MADISON,	)	
	)	
Petitioner,	)	
	)	**CIVIL ACTION**
v.	)	**NO. 16-00191-KD-M**
	)	
JEFFERSON S. DUNN, Commissioner of the Alabama Department of Corrections,	)	
	)	
Respondent.	)	

ORDER

This action is before the Court on Petitioner Vernon Madison's petition for writ of habeas corpus (Doc. 1), motion for stay of execution (Doc. 2), Respondent Jefferson S. Dunn's motion to dismiss pursuant to 28 U.S.C. § 2244(b) (Doc. 6), Respondent's motion to dismiss for lack of exhaustion (Doc. 7), Respondent's brief in opposition to Madison's petition (Doc. 9), Respondent's opposition to the motion for stay (Doc. 10), and Madison's response to the motions to dismiss (Doc. 12). Upon consideration and for the reasons set forth herein, Respondent's motion to dismiss Claim One for lack of exhaustion is DENIED, Madison's petition for writ of habeas corpus is DENIED, his motion for stay of execution is DENIED and Respondent's

motion to dismiss Claim Two pursuant to 28 U.S.C. § 2244(b) and for failure to exhaust is GRANTED.

I. Background

In May 1985, Petitioner Madison was indicted for capital murder for killing Julius Schulte, a police officer with the Mobile, Alabama Police Department. In September 1985, a jury found Madison guilty of capital murder. He was convicted and sentenced to death. His first conviction and death sentence were set aside. *Madison v. State*, 545 So.2d 94, 99–100 (Ala.Crim.App.1987). He was tried and again convicted and sentenced to death. The Alabama Court of Criminal Appeals reversed this decision. *Madison v. State*, 620 So.2d 62, 63 (Ala.Crim.App.1992). Madison was tried a third time and again convicted of capital murder and sentenced to death. *Madison v. State,* 718 So.2d 90, 94 (Ala. Crim. App. 1997). His conviction and sentence were affirmed on direct appeal by the Alabama Court of Criminal Appeals, *id.* at 104, and the Alabama Supreme Court, *Ex parte Madison*, 718 So.2d 104, 108 (Ala. 1998). The petition for writ of certiorari was denied. *Madison v. Alabama*, 525 U.S. 1006, 119 S.Ct. 521 (1998). Madison's petition for state post-conviction relief was dismissed by the state trial court and the dismissal was affirmed. *Madison v. State*, 999 So.2d 561 (Ala.Crim.App. 2006).

Madison then filed his first petition for writ of habeas corpus under 28 U.S.C. § 2254 in this district court. The petition was denied. *Madison v. Allen*, 2011 WL 1004885 (S.D. Ala. March 21, 2011). The Eleventh Circuit Court of Appeals reversed and remanded with instructions regarding Madison's *Batson* challenge. *Madison v. Comm'r, Ala. Dep't of*

Corr., 677 F.3d 1333 (11th Cir. 2012) (reh'g. denied *Madison v. Comm'r, Ala. Dep't of Corr.*, 484 Fed. Appx. 467 11th Cir. 2012) (table)) (cert. denied *Thomas v Madison*, 133 S. Ct. 617 (2012)). On remand, this district court denied his petition. *Madison v. Allen*, 2013 WL 1776073 (S.D. Ala. Apr. 25, 2013). The decision was affirmed. *Madison v. Comm'r, Alabama Dep't of Corr.*, 761 F.3d 1240 (11th Cir. 2014) (cert. denied *Madison v. Thomas*, 135 S. Ct. 1562 (2015) (reh'g. denied *Madison v. Thomas*, 135 S. Ct. 2346 (2015)).

In January 2016, the State of Alabama moved the Alabama Supreme Court to set an execution date. (Doc. 2, p. 3) Madison then filed a petition in the Mobile County Circuit Court pursuant to Alabama Code § 15-16-23, wherein he moved the trial court to stay his execution on basis that he is incompetent to be executed (*id.*). The Code provides for suspension of execution of the sentence of death of a convicted person, if "at anytime before the execution of the sentence, it is made to appear to the satisfaction of the trial court that the convict is then insane[.]" Ala. Code § 15-16-23. Madison requested a delay in setting the execution date until his competency claim was adjudicated. However, the Supreme Court of Alabama set his execution for Thursday, May 12, 2016 (*Id.*).

The Mobile County Circuit Court found that Madison had made a preliminary showing of incompetency, ordered an evaluation, and held a hearing on April 14, 2016. (Doc. 2, p. 4) After post-trial briefs were filed, the state court denied his § 15-16-23 petition on April 29, 2016. The circuit court found that Madison had "not carried his burden by a

preponderance of the evidence, that it is more likely than not, that he, Madison, does not rationally understand the punishment he is about to suffer and why he is about to suffer it." (Doc. 7-2; *Madison v. State of Alabama*, Civil Action 1985-001385.80 (Document 43) (Circuit Court of Mobile County, Alabama, Apr. 29, 2016)).

Madison then filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254, in this court. (Doc. 1) As to his competency, Madison alleges that he has experienced multiple strokes including a recent thalamic stroke in January 2016, major vascular neurological disorders, vascular dementia, and other serious medical conditions including diabetes and hypertension. He further alleges that these medical problems have damaged his brain and left him with declining cognitive function, diminished mental capacity, severe memory deficits, dementia, slurred speech, blindness, incontinence, and an inability to walk. (Doc. 1)

Based on his mental incompetence, Madison asserts that he does not have an independent recollection of the facts of his offense and does not have a rational understanding of why the State is seeking to execute him. Therefore, according to Madison, the State would violate the Eighth Amendment's prohibition against cruel and unusual punishment as provided in *Ford v. Wainwright*, 477 U.S. 399 (1986) should it carry out his execution. The court has labeled this Claim One.

Madison also alleges that because he suffers from dementia, he is in a class of people for whom execution is categorically unconstitutional. Madison argues that executing persons with diminished

capacity would not serve the goals of the death penalty, *i.e.*, retribution or deterrence and would be unconstitutional as set forth in *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). The court has labeled this Claim Two.

Madison also filed a motion to stay his execution. (Doc. 2) Madison argues that a stay of execution should be granted because he has a non-frivolous claim of constitutional error that cannot be resolved on the merits before the scheduled date of execution.

II. Exhaustion of the *Ford* claim (Claim One)

Title 28 United States Code § 2254 requires that petitioners seeking relief in federal court must first exhaust available state remedies. Specifically, § 2254(b)(1) states:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

Madison argues that, pursuant to Ala. Code § 15-16-23, there is no appellate review of the state court's

decision available in the Alabama state courts. Thus, he contends that he has exhausted his state remedies. In support, he relies on *Weeks v. State*, 663 So. 2d 1045 (Ala. Crim. App. 1995) and *Magwood v. State*, 449 So. 2d 1267 (Ala. Crim. App. 1984). Both cases held that § 15-16-23 decisions were not reviewable. The statutes states:

> If after conviction and sentence to death, but at any time before the execution of the sentence, it is made to appear to the satisfaction of the trial court that the convict is then insane, such trial court shall forthwith enter an order in the trial court suspending the execution of the sentence to the time fixed in the order; and, if it subsequently is made to appear to the court that such convict, the execution of the sentence of whom has thus been suspended, is restored to sanity, the trial court shall forthwith have another order entered ordering and commanding the execution of the judgment and sentence originally awarded in said court at a time fixed in such order. **This mode of suspending the execution of sentence after conviction on account of the insanity of the convict shall be exclusive and final and shall not be reviewed or revised by or renewed before any other court or judge.** No court or judge in this state shall have the power or right to suspend the execution of sentence of any other court of record on account of the insanity of the convict. This section shall not prevent the judge or court

> from impaneling a jury to try the question of insanity or from examining such witnesses as he may deem proper for guidance.

Ala. Code § 15-16-23 (emphasis added).

Respondent argues that Madison has failed to exhaust his state remedies because the state court's decision made pursuant to § 15-16-23 is an appealable decision, which Madison has failed to appeal. Respondent points out that Ala. Code § 15-1-1, which pertains to §15-1623, states: "Any provisions of this title regulating procedure shall apply only if the procedural subject matter is not governed by rules of practice and procedure adopted by the Supreme Court of Alabama." Ala. Code § 15-1-1. (Doc. 7 at 2) Ala. R. Crim. P. 32.4 states:

> A proceeding under this rule displaces all post-trial remedies except post-trial motions under Rule 24 and appeal. **Any other post-conviction petition seeking relief from a conviction or sentence shall be treated as a proceeding under this rule.** Proceedings under this rule shall be governed by the Rules of Criminal Procedure, except that the trial court in its sole discretion may allow the taking of depositions for discovery or for use at trial.

Ala. R. Crim. P. 32.4 (emphasis added). Ala. R. Crim. P. 32.10(a) states:

> Any party may appeal the decision of a circuit court according to the procedures of the Alabama Rules of Appellate Procedure to the Court of Criminal Appeals upon

> taking a timely appeal as provided in Rule 4, Alabama Rules of Appellate Procedure

Ala. R. Crim P. 32.10.

In the motion to dismiss for lack of exhaustion, citing *Ex Parte Cate*, 134 So.3d 870 (Ala. 2013), Respondent summarizes, "[i]n fact, when the Alabama Supreme Court reviewed § 15-16-22, a closely related 'cousin' to § 15-16-23 that pertains to competency evaluations prior to trial, the Alabama Supreme Court noted that these provisions were procedural in nature and that they must yield to the Alabama Rules of Criminal Procedure." (Doc. 7 at 3) From this, Respondent makes a novel argument that §15-16-23 is unenforceable because it must yield to the general appellate rules of criminal procedure.

Upon review of *Ex Parte Cate*, the court concludes that Respondent overstates its relevancy to the issue at hand. In *Ex Parte Cate*, the Alabama Supreme Court was faced with provisions in the Alabama Code and the Alabama Rules of Criminal Procedure that both addressed the procedure for ordering competency evaluations. The Alabama Supreme Court held, "Section 15–16–22(a) does not grant the trial court discretion to order a defendant to submit to a mental examination independent of the procedural framework of Rule 11.2(a)." 134 So. 3d at 875. For this pronouncement the Court referenced Ala. Code §15-1-1, which provides, [a]ny provisions of this title regulating procedure shall apply only if the procedural subject matter is not governed by the rules of practice and procedure adopted by the Supreme Court of Alabama." 134 So. 3d at 8753, n.3. However the Court concluded that the statute and the rule were not inconsistent: "The duty imposed by

[§] 15-16-22(a) upon the trial court to order a mental examination of a defendant is consistent with Rule 11.2(a)(2); § 15-16-22(a) does not expand the trial court's discretion beyond the limits established by Rule 11.2(a)." 134 So. 3d at 875.

In this case, § 15-1-1 is inapplicable because the subject matter of §15-16-23 is not addressed in a rule of practice and procedure adopted by the Supreme Court of Alabama. Section 15-16-23 prohibits any other court from reviewing the trial court's determination regarding suspension of execution under this section. In other words, no other court has jurisdiction to consider a petition for suspension of the execution or to review the decision of the trial court. The bar on review by other courts of § 15-16-23 decisions is a substantive rule, not procedural. In contrast, Ala. R. Crim. 32.10 governs who can appeal (any party) and how (using Alabama Rules of Appellate Procedure), it does not govern whether an issue is appealable. As the Alabama Supreme Court stated in *Ex parte Ward*, "[t]here are, however, some limitations on our authority to promulgate and effectuate rules. '[R]ules shall not abridge, enlarge or modify the substantive right of any party." Const. of 1901, amend. 328, § 6.11[.]'" 540 So. 2d 1350, 1351 (Ala. 1988) (internal citations omitted). Any rule allowing a petitioner to appeal a suspension of execution would be an enlargement of the limited substantive right granted in § 15-16-23 (to seek a stay from the trial court) and thus in violation of the Alabama Constitution. *See Schoenvogel ex rel. Schoenvogel v. Venator Grp. Retail, Inc.*, 895 So. 2d 225, 236 (Ala. 2004) ("[I]t is clear that § 6.11 envisions that this Court's power to promulgate rules of practice and procedure for all courts could

supersede legislatively enacted rules of practice and procedure, so long as the rules promulgated by this Court did not abridge, enlarge, or modify the substantive rights of any party, and subject to the right of the Legislature to change the court-adopted rules by a general act of statewide application.").

The court finds that the language of § 15-16-23 expressly provides that a determination made under this section is not appealable. The Alabama Court of Criminal Appeals has held the same. *Weeks v. State*, 663 So. 2d at 1046[1] ("This case is governed by § 15-16-23 and this court's application of that statute in *Magwood*. The statute clearly states that a finding by the trial court on the issue of insanity, as it relates to this statute, is not reviewable by any other court."). Accordingly, Madison has exhausted his state remedies under § 15-16-23 as to Claim One. Thus, Respondent's motion to dismiss the petition for writ of habeas corpus for lack of exhaustion as to Claim One (Doc. 7) is DENIED and his opposition to the motion to stay (Doc. 10) based upon this same argument is OVERRULED.

The court acknowledges that this is Madison's second habeas petition and that he brings a *Ford v.*

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[1] In Weeks v. State, the Alabama Court of Criminal Appeals quoted its previous decision in Magwood v. State, which expanded upon the reasoning behind Ala. Code §15-16-23 as follows: "It is interesting to note that the legislature provided that the order of the trial court '... shall not be reviewed or revised by or renewed before any court or judge. No court or judge in this state shall have the power or the right to suspend the execution of sentence of any other court of record on account of the insanity of the convict.' This provision was obviously necessary if any sentence of execution is ever to be carried out. Otherwise, a person awaiting execution.

Wainwright claim for the first time. However, Madison's *Ford v. Wainwright* claim of incompetency to be executed (because of mental incompetence at the time of the scheduled execution) is not a claim that must be brought in an initial habeas petition. *Panetti v. Quarterman*, 551 U.S. 930, 945, 127 S. Ct. 2842, 2853 (2007) ("We conclude, in accord with this precedent, that Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe."). Therefore, the court finds that the decision in *Panetti* provides jurisdiction as to Madison's *Ford*-based incompetency claim brought in his second habeas petition.

III. *Atkins* claim (Claim Two)

In his petition, Madison raises a second claim wherein he alleges that he falls within a class of persons, those with diminished mental capacity caused by dementia, for whom there is a categorical ban on the death sentence based upon the Eighth Amendment citing *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005). (Doc. 1, ¶ 31-34, p. 19-20) In the motion to stay, Madison argues that his execution should be stayed because the confluence of the line of cases following *Atkins* and *Roper* dictates that he falls within this protected category of persons and his execution would be unconstitutional. (Doc. 2, p. 10-12)

Respondent moves to dismiss this second claim pursuant to 28 U.S.C. § 2244(b) (Madison failed to obtain authority from the Court of Appeals for the Eleventh Circuit before bringing his second claim in

a second habeas petition) and because Madison failed to fairly present the claim and exhaust his remedies in state court. (Doc. 6)

Title 28 U.S.C. § 2244(b)(3)(A) provides that "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." An exception exists when the Supreme Court has expressly held that § 2244(b) does not apply to a specific type of claim, such as in *Panetti*, where the Supreme Court held that the "statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe." 551 U.S. at 947. In *Ford v. Wainwright*, the Supreme Court held that the "Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 409–410. In *Panetti*, the Supreme Court held that a *Ford*-based claim is not ripe until the petitioner's date of execution has been set. 551 U.S. at 945-957. The Supreme Court concluded "that Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe." 551 U.S. at 945.

Madison has not presented any support for a finding that an *Atkins* claim is in the "unusual posture" wherein the bar of § 2244(b)(3) is lifted, thus allowing Madison to file a second or successive habeas petition based on this claim without first obtaining approval from the appropriate court of

appeals. Moreover, *Panetti* is clear that the waiver of the restrictions in 2244(b) only applies to *Ford*-based claims. Consequently, the Eleventh Circuit must authorize this claim before Madison's petition may be considered by this court.

Additionally, Madison's second claim was never fully and fairly presented to the state court and is thus not exhausted. Madison's state court petition for suspension of his death sentence did not raise an argument based upon an extension of *Atkins* to include a category of persons with dementia. (Doc. 7-1) However, the state court transcript indicates that Madison argued at the hearing that dementia placed "him within a special category for people for whom execution is not appropriate" based on *Ford* and *Panetti,* but without mention of *Atkins.* (Doc. 8-1, p. 133, Hearing Transcript) Moreover, in a post-trial filing, Madison briefly references *Atkins* and the argument he now makes before this court. (Doc. 8-2, pp. 10-11) But the court finds that these brief references to the issue failed to give the trial court a fair opportunity to consider the issue. This is especially true due to the limited nature of the proceedings pursuant to § 15-16-23, *i.e.*, to determine the sanity of the petitioner. Thus, the claim has not been exhausted.

The Eleventh Circuit has stated that a prisoner cannot show "a substantial or significant likelihood of success on the merits" of an issue when that issue is "squarely foreclosed" by the exhaustion requirement found in 28 U.S.C. § 2254. *Gore v. Crews,* 720 F.3d 811, 815 (11th Cir. 2013). Therefore, the court finds that it lacks jurisdiction to consider Madison's *Atkins*-based claim in his habeas

petition and the *Atkins*-based argument in his motion to stay. Accordingly, the Respondent's motion to dismiss the second claim in the petition for writ of habeas corpus, brought pursuant to 28 U.S.C. § 2244(b) (Doc. 6) is GRANTED and that claim is dismissed without prejudice. *Gore*, 720 F.3d at 815 ("If a petitioner fails to exhaust his state remedies, a district court must dismiss the petition without prejudice to allow for such exhaustion.").

IV. Injunctive relief as to the *Ford* claim (Claim One)

This court's authority to grant a stay of execution is found in 28 U.S.C. § 2251.[2] "A request for a stay of execution is a request for equitable relief." *White v. Jones*, 408 Fed. Appx. 293, 294-95 (11th Cir. 2011)[3] (citing *Williams v. Allen*, 496 F.3d 1210, 1212–13 (11th Cir. 2007) and *Hill v. McDonough*, 547 U.S. 573, 584, 126 S.Ct. 2096, 2104 (2006)).

Equitable principles to be considered include "(1) 'sensitiv[ity] to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts,' (2) the plaintiff's satisfaction of 'all of the requirements for a stay, including a showing of a significant possibility of

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[2] "(a) In general -- (1) Pending matters.--A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251(a)(1).

[3] "Unpublished opinions are not considered binding precedent, but may be cited as persuasive authority." U.S. Ct. of App. 11th Cir. Rule 36-2.

success on the merits,' (3) the application of 'a strong equitable presumption against the grant of a stay where the claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay,'[4] and (4) protection of the 'States from dilatory or speculative suits.'" *White*, 408 F. Appx. at 294-295 (citations omitted). "The strong interest of the State and the victim's families is in 'the timely enforcement of a sentence'", [ ] which acquires 'an added moral dimension' once post-trial proceedings finalize." *White*, 408 F. Appx. at 294-295 (quoting *Calderon v. Thompson*, 523 U.S. 538, 556, 118 S.Ct. 1489, 1501 (1998) and *Arthur v. King*, 500 F.3d 1335, 1340 (11th Cir.2007)).

As to satisfaction of the requirements for a stay, the court may grant a stay of execution if the moving party shows a substantial likelihood of success on the merits, irreparable injury unless the stay issues, that the stay would not substantially harm the other party; and if issued, the stay would not be adverse to the public interest. *In re Holladay*, 331 F.3d 1169, 1176 (11th Cir. 2003) (citing *Bundy v. Wainwright*, 808 F.2d 1410, 1421 (11th Cir. 1987)).

Without dispute, Madison has met the second criteria. Madison will suffer irreparable injury if the stay is not granted. *In re Holladay*, 331 F.3d at 1177 (granting a stay of execution and finding that "the irreparability of the injury that petitioner will suffer in the absence of a stay to be self-evident"). As to the

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[4] Madison filed his state petition within a month of the motion to set his execution date. See Stewart v. Martinez-Villareal, 523 U.S. 637, 645 (1998). He filed his petition for habeas corpus in this court within a week of the state court's decision. Thus, the court finds this presumption inapplicable.

third criteria, substantial harm to other parties, the Eleventh Circuit Court of Appeals has explained that no substantial harm will "flow to the State of Alabama or its citizens from postponing petitioner's execution to determine whether the execution would violate the Eighth Amendment." *In re Holladay*, 331 F.3d at 1177. As to the fourth criteria, the Eleventh Circuit has acknowledged the "State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Jones v. Comm'r. Georgia Dep't of Corr.*, 812 F. 3d 923, 932 (11th Cir. 2016). The court is also mindful that "[e]ach delay, for its span, is a commutation of a death sentence to one of imprisonment." *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir.1983). However, it would not be adverse to the public interest to stay an execution that may violate the Constitution. Thus, the court turns to the first factor: whether there is a substantial likelihood of success on the merits.

Madison argues that there is a substantial likelihood that he will succeed on the merits of his claim because the Eighth Amendment prohibits his execution. The court disagrees and finds that not only is there not a substantial likelihood that Madison will succeed on the merits, but that the petition is due to be denied on the merits.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996, this court does not have "plenary authority to grant habeas relief" but instead, the authority is "conditioned on giving deference to the states." *Jones v. Walker*, 496 F. 3d 1216, 1226 (11th Cir. 2007). Specifically, 28 U.S.C. § 2254 provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) and (2).

"Pursuant to § 2254(d)(1). the phrase 'clearly established Federal law' means 'the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision.' " *Smith v. Campbell*, 620 Fed. Appx. 734, 746 (11th Cir. 2015) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S.Ct. 1166, 1172 (2003) (quotation marks omitted)). "A state court's application of federal law is not unreasonable under § 2254(d)(1) 'so long as fairminded jurists could disagree on the correctness of the state court's decision.'" *Smith*, 620 Fed. Appx. at 746 (quoting *Harrington v. Richter*, 562 U.S. 86, 101, 131 S.Ct. 770, 786 (2011) (quotation marks omitted)).

"As to § 2254(d)(2), 'a factual determination will not be overturned on factual grounds unless

objectively unreasonable in light of the evidence presented in the state-court proceeding.'" *Smith*, 620 Fed. Appx. at 746 (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 1041 (2003)). "We may not characterize ... state-court factual determinations as unreasonable merely because we would have reached a different conclusion in the first instance." *Smith*, 620 Fed. Appx. at 746 (quoting *Brumfield v. Cain*, 576 U.S. ——, ——, 135 S.Ct. 2269, 2277 (2015) (quotation marks omitted)). "The Supreme Court has found a state court's factual finding to be unreasonable where the record before the state court did not support the factual finding." *Smith*, 620 Fed. Appx. at 746-747 (quoting *Wiggins v. Smith*, 539 U.S. 510, 528–29, 123 S.Ct. 2527, 2539, 156 L.Ed.2d 471 (2003)).

In *Panetti*, the Supreme Court explained that "[u]nder AEDPA, a federal court may grant habeas relief, as relevant, only if the state court's "adjudication of [a claim on the merits] ... resulted in a decision that ... involved an unreasonable application" of the relevant law. When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires." 551 U.S. 930 at 953.

First, Madison argues that because of his brain damage and resulting mental incompetency and dementia, he does not have an independent recollection of the offense for which he was convicted and does not have a rational understanding of why the State is attempting to execute him. Madison

argues that the state court failed to consider his dementia and resulting deficits in long-term memory and incorrectly found that he "failed to meet his burden of proving by a preponderance of the evidence that he '**suffers from mental illness** which deprives [Mr. Madison] of the mental capacity to rationally understand that he is being executed as a punishment for a crime."[5] (emphasis in original) Madison argues that "by failing to consider whether [he] was incapable of rationally understanding his execution because of his dementia and corresponding memory deficits, the state court unreasonably imposed a standard more restrictive than what the law clearly established by *Panetti* requires" and as a result "the state court's determination was both an unreasonable application of, and contrary to, clearly established federal law." (Doc. 2, p. 9-10)

Second, Madison argues that by limiting the analysis to whether he was incompetent because of "mental illness", the "state court failed to address crucial facts regarding his strokes and resulting dementia." Madison argues that this failure to address cannot be construed as a rejection of that evidence, and therefore, the decision was based on an

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[5] The court notes that the state court order indicates that the parties agreed to the burden of proof, as follows: "The parties agree that the burden of proof in this case is that the Petitioner must satisfy the trial court by a preponderance of the evidence, i.e., that it was more likely so than not, that the Petitioner suffers from a mental illness which deprives the prisoner of the mental capacity to rationally understand that he is begin executed as a punishment for a crime." Madison v. State of Alabama, Civil Action 1985-001385.80 (Document 43, p. 5) (Circuit Court of Mobile County, Alabama, Apr. 29, 2016).

unreasonable determination of the facts in light of the evidence presented. (Doc. 2, p. 10)

Based upon the evidence cited in the state court's opinion, it is clear that the state court considered the evidence of Madison's recent diminished capacity and memory loss in reaching its determination that Madison had the requisite rational understanding that he was to be executed because of the murder he committed and that Madison understood that his execution was retribution for the crime. See *infra.* Thus, whether the court was required under *Ford* to consider mental issues that may fall outside of the clinical definition of mental illness but still affects rational thinking, is moot. The question then is whether the state court's determination was an unreasonable application of, and contrary to, clearly established federal law as enunciated in *Ford* and *Panetti.* In this regard the court agrees with the Respondent that the state court's decision was not an unreasonable application of, nor contrary to, clearly established federal law and adopts the Respondent's reasoning (as amended)[6] as follows:

First the state court correctly stated the law to be applied. The state court recognized the holding of *Ford* as being that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." (Vol. II, Tab R-12, at 3 (*quoting Ford*, 477 U.S. at 409-10)) The state court further identified the holding of *Panetti* as requiring an inquiry into whether a prisoner's mental illness deprives him of the mental capacity to understand that he is being executed as a punishment for a

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[6] To a substantial extent, the reasoning is adopted verbatim from Doc. 9, pp. 12-18.

crime, including whether the prisoner has a rational understanding of the State's rationale for his execution. (Vol. II, Tab R-12, at 4 (*citing Panetti*, 551 U.S. at 954, 959))

The state court recognized that Madison was entitled to a "fair hearing," including an opportunity to be heard, the opportunity to submit evidence and argument through counsel, and the right to present independent expert psychiatric evidence through the defense. (*Id.* at 3-4 (*quoting Panetti,* 551 U.S. at 949)) The state court further identified the question considered as whether "it was more likely than not, that the Petitioner suffers from a mental illness which deprives the prisoner of the mental capacity to rationally understand that he is being executed as a punishment for a crime." (*Id.* at 4)

The state court considered the testimony of Dr. Kirkland, a court-appointed forensic psychologist, Dr. Goff, the defense-retained expert psychologist, and Warden Davenport, the Warden of Holman Prison (where Madison is housed). (*Id.* at 10) The state court also considered all of the exhibits offered by Madison, including medical records from the University of South Alabama Medical Center and Mobile Infirmary. (*Id.* at 10)

The state court found (1) that Madison failed to meet his burden of proof, (2) that the testimony of the court-appointed expert was due to be credited, (3) that Madison has a rational understanding, as required by *Panetti*, that he is going to be executed because of the murder he committed and a rational understanding that the State is seeking retribution and that he will die when he is executed, and (4) that

the evidence does not support that Madison is delusional. (*Id.* at 10)

Thus, it is apparent that the state court adjudication of these claims applied the relevant *Panetti/Ford* standard for determining competency to be executed, considered all of Madison's factual averments, and found that any dementia, and the alleged deficits in memory associated with that condition, did not prevent Madison from having a rational understanding of his execution and the reasons for his execution.[7] In finding that Madison

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[7] The trial court's focus on lack of evidence of delusion and psychosis was oriented toward making specific findings regarding Madison's allegations in the state court petition that he did suffer from delusions and psychosis. For example, Madison alleged in his petition that his mental illness was "marked by paranoid delusions and other disabilities" (Vol. I, Tab R-1, at 1), that an expert testified Madison had suffered "from a delusional disorder that has existed since he was an adolescent" (Vol. I, Tab R-1, at 5), that Madison had a "well-documented history of paranoia" of "a persecutory type" (Id.), and a claim that Madison had once exhibited delusional thinking including a belief that he was being used as a guinea pig in medical experiments (Id.) Madison further relied on testimony of another expert that he suffered "from paranoid illness of profound proportion," "a paranoid state; that is, a psychotic mental illness," and that Madison was expected to remain in "a psychotic condition" if he did not receive treatment [which he did not in prison]." (Id. at 5-6) Madison further relied upon an allegation of a previous defense expert that his "mental illness is chronic, and there is a more than ninety percent chance it will never go away." (Id. at 6) Madison's own legal team, although suffering from the fact they were lay witnesses, alleged that Madison was presently suffering from paranoid delusions. (Id.) Against these, and numerous other unfounded allegations of delusions and paranoia in the petition, the trial court prudently entered findings of fact.

was competent to be executed, the state court relied on the following facts:

> 1) Dr. Kirkland's finding that Madison did not suffer from paranoia, delusion, or psychosis;
>
> 2) Dr. Kirkland's finding that "even though Madison was functioning at the low average range of intellect, if not the low normal range, that 'while he may have suffered a significant decline post-stroke, his current functioning still would appear to result in a forensic finding that Madison understands the exact posture of his case at this point.'";
>
> 3) Dr. Kirkland's finding that Madison was able to discuss each appeal and "marveled each time with the fact that the whole process would end up being back in Judge McCrae's court;
>
> 4) Dr. Kirkland's finding that Madison appeared to understand his legal situation and is able to relate to his attorneys, including the ability to give details of the history of the case regarding appeals and his concerns;
>
> 5) Dr. Kirkland's testimony that Madison could remember specific things about the time of the offense as well as each trial, including the jury's advisory recommendation and the *Batson* challenge considered by this Court in 2013;

6) Dr. Goff's report that Madison recognized he was in prison for murder;

7) Dr. Goff's report that Madison felt his conviction was "unjust,";

8) Dr. Goff's report that Madison "understands the sentence, specifically the meaning of a death sentence. He understands the idea of being dead...He understands the procedures, or at least he seemed to.";

9) Dr. Goff's testimony that, "I think [Madison] understands that he—that [the State is] seeking retribution. I don't think he understands the act that he is being—that he is being punished for.";

10) Medical records showing that Madison's January 2016 hospitalization was based on symptoms unrelated to a "small acute CVA" but rather on synthetic marijuana and methamphetamine use.";

11) Medical records showing Madison was evaluated in January 2016 and "completed receptive language task of answering complex yes/no questions and following multi-step commands with 100% [accuracy]. Expressive language tasks of naming items was completed with 100% [accuracy], automatic with a 100% [accuracy].";

12) Medical records from Madison's January 2016 hospitalization indicating that upon arrival at the hospital Madison "had an altered mental status, but apparently now is back to baseline.";

> 13) Medical records from May 2015 showing Madison was "awake/alert. Oriented to person, place and situation, still confused about time.";
>
> 14) Warden Davenport's testimony that Madison responded with "My lawyers are supposed to be handling that," in response to the reading of the death warrant; and
>
> 15) Warden Davenport's testimony that Madison was not receiving mental health treatment from the Alabama Department of Corrections.

(Vol. II, Tab R-12, at 5-9) Based on this evidence, the state court found that Madison had not carried his burden of proof on the issue of his competency. (Vol. II, Tab R-12, at 10) More specifically, the state court found that Madison possessed a rational understanding that he was being executed for the murder he committed and that his sentence was in retribution for the crime. (*Id.*)

Madison has attempted to convince this court that it should credit testimony that was more favorable to Madison's position and find the state court acted unreasonably in doing otherwise. However, that is not the role of this court. *See Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010) ("A state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.")). The court may only examine the evidence to determine whether the state court's conclusions were unreasonable in light of the evidence that the state

court reasonably found to be credible. In that regard, it was not unreasonable for the state court to rely on the opinions of Dr. Kirkland, which was supported by other evidence of record.

Madison also claims that the state court's factual findings constituted an unreasonable determination of the facts because the state court failed "to even consider evidence of dementia, and its impact on Mr. Madison's cognitive functioning and understanding of the proceedings." As previously stated, this is incorrect. In finding that Madison failed to prove by a preponderance of the evidence that he was incompetent to be executed, the state court relied on Madison's ability to talk with Dr. Kirkland about "very specific things that would indicate that he could remember specific things about the time of the offense even, as well as each trial, as well as the outcome with regard to judicial override and Batson challenge" and the death penalty versus life without parole. (Vol. II, Tab R-12, at 5-6) Finally, the state court also relied on Dr. Goff,[8] who testified that despite any dementia, Madison "is able to understand the nature of the pending proceeding and he has an understanding of what he was tried for[.]" (Vol. II, Tab R-12, at 7)

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[8] To the extent the two expert's opinions differed on the issue of whether Madison's dementia affected his competency to be executed, the state court's election to rely on Dr. Kirkland's opinion rather than Dr. Goff's opinion is entitled to great deference and will not be disturbed unless determined to be unreasonable. See, e.g., Panetti v. Stephens, 727 F.3d 398, 410-11 (5th Cir. 2013) (noting "[t]he [district] court's careful draw on the experts' conflicting testimony is entitled to 'great deference' from this Court" and that this "is probably sufficient by itself to sustain the district court's judgment under a clear-error standard.").

The state court also took notice of Madison's confusion and mental status at the time of his hospitalization in January 2016 (Vol. II, Tab R-12, at 7), but then went on to note that Madison was "alert, well appearing, and in not distress" and "alter and oriented X 3" prior to his discharge (*Id.* at 8) The state court further relied on a consulting physician's notation that Madison had returned "back to baseline" by the time he was discharged from the hospital in January 2016. (*Id.* at 8) Thus, it is evident that the state court did consider the effects on Madison's dementia on his competency to be executed.

In sum, having considered the evidence deduced at the hearing, the court finds that the determination of facts by the state court was not an unreasonable determination of the facts. Also the state court's determination was neither an unreasonable application of, nor contrary to, clearly established federal law.

Ultimately the question presented by the first claim in Madison's habeas petition is whether "some fair minded jurists could agree" with the circuit court's ultimate conclusion that Madison is competent to be executed given the ultimate opinion of Dr. Kirkland (which the trial court fully credited) and Dr. Goff (of which the trial court partially credited), the medical records showing that Madison had returned to "baseline" before his discharge from the hospital in January 2016, and Madison's response to Warden Davenport's reading of the death warrant. *See Ferguson*, 716 F.3d at 1340. Because the answer to this question is "yes, fair minded

jurists could agree with that conclusion," Madison is not entitled to relief. *Id.* at 1340-41.

V. Conclusion

The court finds that the state court correctly applied *Ford* and *Panetti* and that the decision was not based upon an unreasonable application of, or contrary to, clearly established federal law or an unreasonable determination of the facts in light of the evidence presented to the state court. Accordingly, for the reasons set forth herein, Madison's petition for writ of habeas corpus is DENIED, his motion for stay of execution is DENIED, Respondent's motion to dismiss Claim Two (*Atkins* claim) pursuant to 28 U.S.C. § 2244(b) and for failure to exhaust is GRANTED, and Respondent's motion to dismiss for lack of exhaustion as to Claim One (*Ford* claim) is DENIED.

VI. Certificate of Appealability

Pursuant to Rule 11(a) of the Rules Governing § 2254 Cases, the court must determine whether Madison is entitled to a certificate of appealability. 28 U.S.C. foll. § 2254, Rule 11(a) ("The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."). The habeas corpus statute states that an applicant is entitled to appeal a district court's denial of a habeas corpus petition only where a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue only where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2243(c)(2).

"Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurist would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595 (2000) or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039 (2003) (internal quotations omitted). Madison has not met his burden to show that reasonable jurists would find debatable his constitutional claims or that the issues he presented were adequate to deserve further review. Therefore, he is not entitled to a Certificate of Appealability.

DONE and **ORDERED** this 10th day of May 2016.

s / Kristi K DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE

DOCUMENT 43

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

VERNON MADISON

Petitioner,

V. Case No. CC-1985-001385.80

STATE OF ALABAMA

Respondent.

ORDER

This matter is before this Court on a Petition filed on behalf of Vernon Madison, requesting a suspension of Mr. Madison's death sentence pursuant to Alabama Code Section 15-16-23, Code of Alabama 1975. The sole contention made by Vernon Madison in the Petition is that he is incompetent to be executed.

PROCEDURAL HISTORY

Mr. Madison underwent three separate trials in the Circuit Court of Mobile County, Alabama, before the Honorable Ferrill D. McRae. At the conclusion of each trial, Judge McRae sentenced Madison to death. Madison's third trial was held in April of 1994, and Madison was sentenced to death. His case was affirmed on appeal, Madison v. State, 718 So.2d 90 (Ala. Crim. App. 1997); Ex parte Madison, 718 So.2d 104 (Ala. Crim. App. 1998), and the United States Supreme Court denied certiorari review. Madison v. Alabama, 525 US 1006 (1998).

Madison filed a Rule 32 post conviction petition pursuant to the Alabama Rules of Criminal Procedure. This Rule 32 Petition was dismissed by the Alabama Court of Criminal Appeals without a hearing. Madison v. State, 99 So.2d 561 (Ala. Crim. App. 2006). The Alabama Supreme Court denied certiorari review.

On January 8, 2009, Mr. Madison filed his first petition and only petition for Federal habeas corpus relief pursuant to 28 U.S.C. Section 2254. Relief was denied by the District Court, but the Court of Appeals for the Eleventh Circuit reversed the Court's denial and remanded with instructions. Madison v. Commissioner's, Ala. Dept. Of Corr., 677 F. 3rd 1333 (11th Cir. 2012). In 2013, the District Court again denied Mr. Madison's petition for habeas corpus relief and that denial was affirmed by the Court of Appeals of the Eleventh Circuit in 2014, Madison v. Commissioner's Ala. Dept. Of Corr., 761 F. 3rd 1240 (11th Cir. 2014). Certiorari review was denied by the United State Supreme Court in March of 2015. Madison v. Thomas, 135 S.Ct. 1562 (2015). A petition for re-hearing was filed by Madison and that was denied by the United States Supreme Court on May 18, 2015. Madison v. Thomas, 135 S.Ct. 2346 (2015).

On January 22, 2016, the State of Alabama moved the Alabama Supreme Court to set an execution date for Mr. Madison. Madison's petition for suspension of the death sentence pursuant to Section 15-16-23 Code of Alabama 1975, was filed on February 12, 2016. On February 18, 2016, the State of Alabama filed a motion to dismiss Madison's petition. The State contended that Section 15-16-23 had been displaced by the Alabama Supreme Court's

Rule-making authority, i.e. Rule 32, and cannot provide the relief that was requested. Initially the Court granted the motion to dismiss and also dismissed the petition filed on behalf of Madison, stating that since the Alabama Supreme Court had now issued a death warrant as of March 7, 2016, setting an execution date of May 12, 2016, the matter should be pursued in the County where the Defendant is housed as a petitioner for habeas corpus. A motion to reconsider was filed by Madison and granted on March 14, 2016.

The undersigned, who is the successor to the Honorable Ferrill D. McRae, set the matter for a competency hearing. The hearing date was set for April 14, 2016. This Court appointed Karl Kirkland, Ph.D., for an expedited examination as to Madison's competency to be executed.

THE HEARING

Dr. Kirkland examined Madison on March 31, 2016, and issued a written report on April 6, 2016. On April 7, 2016, Madison's retained expert, John R. Goff, Ph.D., interviewed Madison at Holman Prison. Dr. Goff issued a written report on April 12, 2016. Both Dr. Kirkland and Dr. Goff appeared at the hearing on April 14, 2016, in the Circuit Court of Mobile County, Alabama, and both were examined and cross-examined by the attorneys.

Section 15-16-23 Code of Alabama, provides:

> "If after conviction and sentence to death, but at any time before the execution of the sentence, it is made to appear to the satisfaction of the trial court that the convict is then insane, such trial court shall

> forthwith enter an order in the trial court suspending the execution of the sentence at the time fixed in the order; . . . ."

Thus, this Court is granted jurisdiction to hear and determine at any time before the execution, whether Madison is incompetent to be executed. This procedure is also in keeping with Ford v. Wainwright, 477 U.S. 399 (June 26, 1986), and Panetti v. Quarterman, 551 U.S. 930 (June 28, 2007). Both Ford and Panetti basically hold that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." See Ford 477 U.S. 409-410.

Ford is a four-justice plurality, with Justice Powell concurring, but with a narrower holding on the issue in which he concurs. Thus Justice Powell's opinion controls on that issue. There were several observations made in the Ford main opinion, such as on the issue of the trial court deciding competency, as follows:

> " . . . Indeed, a particularly acute need for guarding against error inheres in a determination that 'in the present state of the mental sciences is at best a hazardous guess, however conscientious.'" (Cites omitted.) 477 U.S. at 412

Also the four judge plurality noted:

> "The minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a

claim before it is rejected." (Cites omitted.) 477 U.S. At 414. (internal cite omitted)

Justice Powell's opinion in Ford set out the minimum relevant procedures to comply with due process. They are as follows:

> "1. A prisoner seeking a stay of execution must make "a substantial threshold showing of insanity." (This Court has determined that the petition and the affidavits attached to the petition has crossed that substantial threshold.) 551 U.S. at 949.
>
> 2. Once that is done, procedural due process requires a 'fair hearing' in accord with fundamental fairness, i.e. 'a prisoner must be accorded an opportunity to be heard.
>
> 3. The basic requirements for the hearing 'include an opportunity to submit evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." 551 U.S. at 949.

The issue in Panetti, supra, aside from the due process requirements set out above, was,

> "whether the Eighth Amendment permits the execution of a prisoner whose mental illness deprives him of the mental capacity to understand that [he] is being executed as a punishment for a crime." 551 at 954.

* * *

"A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. Ford does not foreclose inquiry into the latter." 551 at 959.

BURDEN OF PROOF

The parties agree that the burden of proof in this case is that the Petitioner must satisfy the trial court by a preponderance of the evidence, i.e., that it was more likely so than not, that the Petitioner suffers from a mental illness which deprives the prisoner of the mental capacity to rationally understand that he is being executed as a punishment for a crime.

TESTIMONY AND EXHIBITS ADMITTED AT THE HEARING

This Court followed its usual procedure for requesting a psychological examination of someone who raises a mental incompetency defense as to whether they could stand trial or whether they were mentally competent at the time of an alleged commission of the act. This is done by appointing the psychologist who has contracted with the State of Alabama to make an initial examination of the defendant. In this case, it was Dr. Kirkland who examined Madison and rendered a written report which was marked into evidence as Court's Exhibit "1". This Court called Dr. Kirkland to the witness stand and briefly examined Dr. Kirkland before turning Dr. Kirkland over to cross examination by the prisoner's counsel and follow up examination by counsel for the State of Alabama.

KARL KIRKLAND, Ph. D.

Dr. Kirkland in his exam found no evidence of paranoia or delusion at the time of his examine, on March 31, 2016. He also found that there was no psychosis present (Court's Exhibit "1" page 9 - Thought Processes), Dr. Kirkland also noted that even though Madison was functioning at the low average range of intellect, if not the low normal range, that "while he may have suffered a significant decline post-stroke, his current functioning still would appear to result in a forensic finding that Madison understands the exact posture of his case at this point. [Madison] was able to discuss each appeal and he marveled each time with the fact that the whole process would end up being back in Judge McCray's (sic) court, * * * he still maintains there is no question in his mind that the trial court judge, who he reports was friends with the victim's family, was going to see him to death, regardless what he had to do to get there. This did not seem delusional at all. He just seems to believe that this was the case." Court's Exhibit "1" page 9 (Intellectual Estimate).

Dr. Kirkland concluded that Madison "appears to understand his legal situation and is able to relate to his attorneys. He was able to give details of the history of his case regarding appeals and was able to discuss his concerns." Court's Exhibit "1" page 11 (Summary and Recommendation).

At the hearing, Dr. Kirkland was asked whether he had an opinion as to whether Mr. Madison understood that the State is seeking retribution against him for an act he committed in the past. Just before that question was asked, Dr. Kirkland stated:

> "There's no question that Mr, Madison has deteriorated a great deal, but he was able to talk with me about very specific things that would indicate that he could remember specific things about the time of the offense even, as well as each trial, as well as the outcome with regard to judicial override and Batson challenge." (transcript p. 68)

Further according to Dr. Kirkland, Madison talked specifically about the death sentence verses life without and discussed the original trial and the first re-trial.

JOHN R. GOFF, Ph.D.

Dr. Gaff has, as Dr. Kirkland, reviewed numerous medical records, including the January 5, 2016, admission which carried a diagnosis of methamphetamine abuse, as well as acute encephalopathy and the history of CVA with hearing and vision changes. After giving a number of tests to Mr. Madison, Dr. Goff interviewed him concerning his understanding of the reasons for the punishment involved. Dr. Goff noted in his written report:

> "In this case this man said that the reason he was in prison was because of 'murder', but he seemed unable to tell me who the victim was except that he had been told that the victim was someone who knew the judge very well. He appeared to be unable to tell me the sequence of events from the offense to his arrest to the trial or any of those details.
>
> * * *

> In regard to the time frame he told me that he had been in prison for 30 years. When asked where he was convicted from he said 'must have been Mobile' although he seemed unsure. Again, he was able to tell me that the crime 'must have been a murder'. He could not identify the name of the victim. As Dr. Kirkland points out, he does feel that his conviction was unjust and he did mention the fact that he had been told that he had three trials and he did indicate that the judge had overridden the jury. I asked him how he knew that and he said that his relatives had told him that.
>
> He understands the sentence, specifically the meaning of a death sentence. He understands the idea of being dead . . He understood the procedures, or at least he seemed to. In terms of the reasoning behind the execution, he indicates that he does not believe that he ever killed anybody, because, 'I never went around killing folks.' (Goff written report p. 7)

Dr. Goff seemed to put particular emphasis on the January, 2016, 'thalamic' stroke, and believes this may be the cause for his difficulties with memory. According to Dr. Goff, while in the hospital Madison was disoriented, amnesic, and also indicated that he cannot remember numerous events that have occurred over the past thirty years or more. Dr Goff believes that Madison is currently functioning in the border-line range of psychometric intelligence, and

believes that a significant decline has occurred over the years, as would be expected."

Dr. Goff indicated also:

> "As to the specific competency requirements at issue here, this man does have a significant cognitive deficit. He is able to understand the nature of the pending proceeding and he has an understanding of what he was tried for, though, he does not appear to have independent recollections of the proceedings themselves or the facts of the case or the identity of the individual who is the victim, (Goff written report p. 8)

Dr. Goff was asked on the witness stand:

> "Does Mr. Madison understand that the State is seeking retribution against him for an act that he committed in the past?
>
> **The Witness:** I think he understands that he - that they're seeking retribution. I don't think he understands the act that he is being - - that he is being punished for. (transcript p. 65)

RECENT STROKES

In his discharge summary from the Mobile Infirmary on January 7, 2016, (Petitioner's Exhibit "10" page 010), James N. Byrd, M.D., noted:

> "Neurology was consulted, and an MRI was obtained, showing a very small acute CVA. This, however, does not account for his symptoms (Right-sided CVA and right-

> sided weakness), Synthetic Marijuana and Methamphetamine use, however, is more clinically consistent with his symptoms, especially with the quick resolution."

Madison was in Mobile Infirmary from January 5, 2016 to January 7, 2016. On admission, his history and physical indicated:

> "Patient is confused and has difficulty hearing questions and his answers are not appropriate at times," (Plaintiffs Exhibit "10" Page 025)

Madison was assessed by Jennifer Jones, a Nurse Practitioner, who noted that Madison had "mild to moderate aphasia; some obvious loss of fluency or facility of comprehension without significant limitation on ideas expressed or form of expression." (Plaintiffs Exhibit "10" Page 053)

Also Madison was seen by a speech and language pathologist who noticed that Madison "completed receptive language task of answering complex yes/no questions and following multi-step commands with 100% ACC. Expressive language tasks of naming items was completed with 100% ACC, automatic with a 100% ACC. Response speech tasks of answering "wh" questions equal 80% ACC, and sentence completion tasks equal 60% ACC, and word fluency 80% ACC. All ST Goals from initial evaluation have been met. The patient presents with mild expressive language deficits. Receptive language, is "WFL" [within functional limits], (Plaintiffs Exhibit "10" Page 057).

Also Dr. Byrd had neurology consulted. That note reveals "neurology was consulted, and an MRI was

obtained, showing a very small acute CVA." (Plaintiff's Exhibit "10" Page 060).

Caesar Agagan, M.D., saw Madison on January 6, 2016. In his review of systems, Dr. Agagan noted that Madison was alert, well appearing , and in no distress, and "alert and oriented X 3". (Plaintiffs Exhibit "10" Page 063).

However, Physical Therapist Elizabeth Baugh noted on January 6, 2016, that Madison was not oriented to place, not oriented to situation, confused-memory deficits and follows 1-step commands. (See Plaintiffs Exhibit "10" Page 070). However, see also, Speech Therapy Assessment (Plaintiffs Exhibit "10" Page 286 - 287). And see Speech Therapy Evaluation (Petitioner's Exhibit "10": Page 291 - 292).

Finally consulting physician Dr. Agagan's consult concerning history of present illness noted:

> "Mr. Madison is a 65 year old gentleman inmate who is on death row, was found yesterday per documentation unresponsive for about 30 minutes with incontinence. He has been brought here for evaluation and management. Initially he had an altered mental status, but apparently now is back to baseline." (Petitioner's Exhibit "10" Page 309).

Madison was admitted to the University of South Alabama Medical Center on May 7, 2015. At that time he was found to have had bilateral cerebellar occipital infarctions. (Petitioner's Exhibit "9" Page 140).

Madison was discharged from USA Medical Center on May 8, 2015, and the nurse's progress note states as follows:

> "MD Liu. Spoke to MD Hood at Holman about PT's current condition and vitals, Pt awake/alert. Oriented to person, place and situation, still confused about time. VSS. P. D/C Holman in care of MD Hood." (Petitioner's Exhibit "9" ND0010.

WARDEN CARTER FITZGERALD DAVENPORT

The State called Mr. Davenport who is the Warden of W.C. Holman Correctional Facility in Atmore, Alabama. Warden Davenport served the death warrant issued by the State of Alabama Supreme Court on Mr. Madison. When asked how the death warrant was served, Warden Davenport said that when he received the warrant, he had his Captain over the death row section of the prison have Mr. Madison brought into his office. At that time the Captain was present and so was Mr. Madison. The Warden told Madison what he had for him, made a copy for him, and informed him by reading the notice and asked for a signature and gave him a copy of the notice. When asked whether Madison said anything during this, the Warden answered, "he did" and that Madison stated "my lawyers are supposed to be handling that." The Warden also indicated that inmates at Holman are assigned mental health codes depending upon whether they receive psychiatric or mental health care. The Warden had had that code checked in late February or early March, 2016, and that Madison

had a "mental health code of 0", meaning he was not receiving treatment for a mental health condition.

VERNON MADISON

Madison was present at the hearing, although he was not called to testify and this Court asked no questions of Vernon Madison. It was difficult to tell if Madison was following all of the testimony or not. Madison appeared to be a physically ill individual, confined to a wheelchair, wearing a neck brace, which was believed to be used for support for his neck because of cervical problems.

CONCLUSION

Based upon the testimony of Dr. Kirkland and his clinical evaluation report admitted into evidence, the testimony of Dr. Goff and his clinical evaluation report admitted into evidence, the testimony of Warden Davenport, all of the Petitioner's Exhibits admitted into evidence, including the records from the University of South Alabama Medical Center and Mobile Infirmary, and argument of counsel, this Court concludes that the Petitioner has not carried his burden by a preponderance of the evidence, that it is more likely than not, that he, Madison, does not rationally understand the punishment he is about to suffer and why he is about to suffer it. This Court accepts the testimony of Dr. Kirkland as to the understanding Madison has concerning the situation. This Court specifically finds that Madison has a rationale understanding, as required by Panetti, that he is going to be executed because of the murder he committed and a rationale understanding that the State is seeking retribution and that he will die when he is executed. Further,

the evidence does not support that Mr. Madison is delusional.

IT IS ORDERED, ADJUDGED and DECREED that the Petition for Suspension of Mr. Madison's Death Sentence Pursuant to Alabama Code 15-16-23 is **DENIED**.

DONE this 29th day of April, 2016.

s/ Robert H. Smith
ROBERT H. SMITH
CIRCUIT COURT JUDGE

Case: 16-12279 Date Filed: 05/04/2017 Page: 1 of 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-12279

VERNON MADISON,

Petitioner–Appellant,

versus

COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS,

Respondent–Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, MARTIN, and JORDAN,Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Beverly B. Martin
UNITED STATES CIRCUIT JUDGE

ORD-42

(ORDER LIST: 578 U.S.)

THURSDAY, MAY 12, 2016

ORDER IN PENDING CASE

15A1175 DUNN, COMM'R, AL DOC V. MADISON, VERNON

The application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit on May 12, 2016, presented to Justice Thomas and by him referred to the Court, is denied.

The Chief Justice, Justice Kennedy, Justice Thomas, and Justice Alito would grant the application to vacate the stay of execution.

Case: 16-12279 Date Filed: 05/12/2016 Page: 1 of 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-12279

D.C. Docket No. 1:16-cv-00191-KD-M

VERNON MADISON,

Petitioner–Appellant,

versus

COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS,

Respondent–Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

Before WILSON, MARTIN, and JORDAN, Circuit Judges.

BY THE COURT:

Petitioner Vernon Madison is an Alabama prisoner scheduled to be executed on May 12, 2016. He has filed a 28 U.S.C. § 2254 petition contending that he is mentally incompetent to be executed under Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595 (1986), and Panetti v. Quarterman, 551 U.S. 930, 127

S. Ct. 2842 (2007). The district court found that Madison properly filed his Ford claim in federal court but denied the claim on the merits. The district court found that Madison had exhausted his Ford claim in state court as required by 28 U.S.C. § 2254(b)(1). It also noted that Madison's Ford claim was not barred as "second or successive" under 28 U.S.C. § 2244(b).

Madison moves for a certificate of appealability ("COA") so that he may appeal the denial of his § 2254 petition. He also seeks a stay of his execution pending appeal.

This Court may issue a COA from the denial of a § 2254 petition "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires a demonstration that "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003).

The Supreme Court has held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." Ford, 477 U.S. at 409–10, 106 S. Ct. at 2602. Then in Panetti the Court clarified that the prisoner must have "a rational understanding of the reason for the execution." 551 U.S. at 958, 127 S. Ct. at 2861. Madison alleges that as result of a series of strokes and other serious medical conditions, he suffers from vascular dementia, which has resulted in significant memory impairment, a decline in cognitive functioning, and ultimately an inability to rationally

understand why the State of Alabama is seeking to execute him. An Alabama trial court denied this claim. Madison did not appeal this decision because, as the Alabama trial court and the district court found, Alabama state law insulates the trial court's competency decision from review by any other Alabama court. See Ala. Code §15-16-23. Madison argues that the state court's decision that he is competent to be executed was contrary to or involved an unreasonable application of Panetti and Ford. Madison also argues that the state court's decision was based on an unreasonable determination of the facts because it failed to consider evidence of his dementia and related impairments.

The Supreme Court has observed that a Ford claim is unique from other constitutional claims that arise in capital cases because it becomes ripe for adjudication only when the petitioner's execution is imminent. See Stewart v. Martinez-Villareal, 523 U.S. 637, 644–45, 118 S. Ct. 1618, 1622 (1998); see also Panetti, 551 U.S. at 947, 127 S. Ct. at 2855 ("[C]laims of incompetency to be executed remain unripe at early stages of the proceedings."). This is therefore the first time that any state or federal court has had the opportunity to consider Madison's claim that his execution is prohibited by the Eighth Amendment. This claim could not have been raised before Madison's execution became imminent, and only the Alabama trial court and the district court have reviewed Madison's claim.

Pursuant to Miller-El, Madison has satisfied § 2253(c)(2)'s standard. Madison's motion for COA is **GRANTED** as to the following issues:

> (1) Whether the state court's decision that Madison is competent to be executed is contrary to or involves an unreasonable application of clearly established federal law.
>
> (2) Whether the state court's decision that Madison is competent to be executed was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

"If a certificate of appealability is granted by the district court or by this court, the panel may grant a temporary stay pending consideration of the merits of the appeal if necessary to prevent mooting the appeal." 11th Cir. R. 22-4(a)(7); see also Ferguson v. Sec'y, Fla. Dep't of Corr., 716 F.3d 1315, 1330, 1344 (11th Cir. 2013) (granting temporary stay of execution under Rule 22-4(a)(7), denying state's motion to vacate the stay, and ultimately affirming the district court's denial of habeas relief after hearing oral argument on the merits of prisoner's Ford claim). Madison's death will render his appeal moot. The Court therefore **GRANTS** Madison's Motion for Stay of Execution.

The Court directs the parties to brief the merits of the issues identified in the COA, pursuant to the following schedule: Petitioner shall file a brief on the merits by May 27, 2016. Respondent shall have until June 10, 2016, to file a response brief. Petitioner shall then have until June 17, 2016, to file a reply brief. The parties are directed to file the briefs electronically and to serve the briefs to opposing counsel electronically at the same time. Oral

argument shall take place in Atlanta on June 23, 2016, at 9:00 a.m. EST. Counsel shall be given 30 minutes per side.

IT IS SO ORDERED.

No. 17-193

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

JEFFERSON DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, Petitioner,

v.

VERNON MADISON, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counsel for Respondent

September 5, 2017

CAPITAL CASE

QUESTION PRESENTED

(Rephrased)

In January, 2016, Vernon Madison suffered a thalamic stroke, which, along with several previous strokes, led to significant decline in his cognitive and bodily functioning; he now speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain. He was given an unrebutted DSM-5 diagnosis of vascular neurological disorder, or vascular dementia, which, along with cognitive decline and significant memory deficits, prevents Mr. Madison from having a rational understanding of why he is to be executed by the State.

Prior to the setting of the execution date in this case, Mr. Madison challenged his competency to be executed in the state trial court pursuant to Ala. Code § 15-16-23. In summary fashion, the state trial court determined that Mr. Madison was competent to be executed.

Pursuant to Alabama state law, this claim could not be reviewed by any state appellate court, and in federal habeas corpus proceedings, the district court rejected Mr. Madison's competency claim. On appeal, after

invoking the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") and setting forth the appropriate standard of deference, the Eleventh Circuit Court of Appeals applied the governing law set forth in this Court's opinions in Ford v. Wainwright, 477 U.S. 399 (1986), and Panetti v. Quarterman, 551 U.S. 930 (2007), and determined that the state trial court unreasonably determined the facts relevant to Mr. Madison's claim and unreasonably applied controlling federal law before concluding that habeas corpus relief was warranted.

Thus, the question presented is:

> Should this Court decline review where the federal court invoked the appropriate standard of deference required by the AEDPA, correctly applied the governing legal precedents from this Court, and properly determined the unreviewed state court decision to be objectively unreasonable in light of the unique facts of this case and controlling federal law?

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INTRODUCTION

The State of Alabama seeks this Court's review based on a factual characterization of the record that is inaccurate and by relying on the testimony of a since-discredited state court-appointed psychologist. The mischaracterization of the record, however, cannot conceal what is evident from the proceedings below: there is nothing particularly compelling or unique about a federal court properly applying governing legal precedent to the specific and undisputed facts of a case to declare an unreviewed state trial court decision to be objectively unreasonable. Under these circumstances, certiorari should be denied.

In January, 2016, Vernon Madison suffered a thalamic stroke, which, along with several previous strokes, led to significant decline in his cognitive and bodily functioning; he now speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain. These strokes led to an unrebutted DSM-5 diagnosis of vascular neurological disorder, or vascular dementia, and along with cognitive decline and significant memory deficits prevent Mr. Madison from having a rational

understanding of why he is to be executed by the State of Alabama.

Petitioner does not address this significant and well-documented medical evidence of Mr. Madison's strokes and his significant cognitive decline, or the unrefuted DSM-5 diagnosis in this case, instead repeatedly asserting that Mr. Madison has "always denied responsibility for [Officer Schulte's] murder," Pet. at 5; see also Pet. at 3, 12, 24. The assertion that Mr. Madison has never admitted his involvement in this crime is inaccurate: at the trial underlying his current conviction and death sentence, Mr. Madison admitted shooting Officer Schulte, but asserted self-defense, Madison v. State, 718 So. 2d 90, 97 (Ala. Crim. App. 1997) ("he again claimed that the killing was committed in self-defense"); likewise, at his second trial, Mr. Madison did not deny shooting the victim, but asserted a mental health defense. See Madison v. State, 620 So. 2d 62, 65 (Ala. Crim. App. 1992) ("he admitted through counsel that he shot Officer Schulte").

Petitioner alternatively argues that the lower court's decision is in conflict with other courts, and certiorari is appropriate to review this alleged split. Pet. at 12-18. But a close reading of the cases cited by

Petitioner makes clear that each of these courts properly applied this Court's governing legal precedents to a wide range of facts and came to different conclusions based on the application of the law to the unique facts of each case.

Finally, Petitioner's argument that this case is an appropriate vehicle for this Court's review because "enormous state resources" have been expended in this case and the lower court's opinion "frustrates" the State's "good-faith attempts to honor constitutional rights," Pet. at 27, is belied by Petitioner's own conduct in this case. The three decades Vernon Madison has spent on death row are a direct result of the State of Alabama's misconduct and its insistence on defending the misconduct for years and in multiple courts. The State illegally removed of all seven of the qualified African American prospective jurors at Mr. Madison's first trial, Madison v. State, 545 So. 2d 94 (Ala. Crim. App. 1987), and introduced illegal evidence at Mr. Madison's second trial, Madison v. State, 620 So. 2d 62 (Ala. Crim. App. 1992). Critically, Mr. Madison would not be on death row had Mobile County Circuit Court Judge Ferrill

McRae[1] not rejected the verdict of the death-qualified jury sentencing Mr. Madison to life without parole. Certiorari should be denied.

STATEMENT OF THE CASE

(Corrected)

A. PRIOR PROCEEDINGS

Vernon Madison was indicted on two counts of capital murder on May 20, 1985, in the Mobile County Circuit Court in Mobile, Alabama. Madison v. State, 620 So. 2d 62, 62 (Ala. Crim. App. 1992). The charges arose from the death of City of Mobile police officer Julius Schulte on April 18, 1985. Id. at 63-64. On September 12, 1985, a jury found Mr. Madison guilty of capital murder, and the trial court subsequently sentenced him to death. Id. at 63. The Alabama Court of Criminal Appeals reversed Mr.

[1]In his time on the bench, Judge McRae overrode six life verdicts, more than any other judge in the state of Alabama. See Woodward v. Alabama, 134 S. Ct. 405, 409 (2013) (Sotomayor, J., dissenting) ("One Alabama judge, who has overridden jury verdicts to impose the death penalty on six occasions, campaigned by running several advertisements voicing his support for capital punishment. One of these ads boasted that he had '"presided over more than 9,000 cases, including some of the most heinous murder trials in our history,"' and expressly named some of the defendants whom he had sentenced to death, in at least one case over a jury's contrary judgment." (citing Equal Justice Initiative, The Death Penalty in Alabama: Judge Override 16 (2011), http://eji.org/eji/files/Override_Report.pdf).

Madison's conviction and sentence after concluding that the Mobile County District Attorney's Office had engaged in racially discriminatory jury selection when it struck all seven qualified African American veniremembers, in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Madison v. State, 545 So. 2d 94, 95-99 (Ala. Crim. App. 1987).

At the second trial, Mr. Madison did not deny shooting the victim; rather, his primary defense was that he was not guilty by reason of mental disease or defect. Madison, 620 So. 2d at 65. On September 14, 1990, Mr. Madison was again convicted of capital murder, and the trial court imposed a sentence of death. Madison, 620 So. 2d at 63. The Alabama Court of Criminal Appeals reversed on the ground that the State had engaged in prosecutorial misconduct when it elicited expert testimony "based partly on facts not in evidence," in violation of Ex parte Wesley, 575 So. 2d 127 (Ala. 1990). Madison, 620 So. 2d at 73.

Mr. Madison's third trial was held from April 18, 1994, through April 21, 1994. At the guilt phase of trial, Mr. Madison again did not deny that he shot the victim, but claimed that he did so in self-defense. Madison v.

State, 718 So. 2d 90, 97 (Ala. Crim. App. 1997).[2] On April 21, 1994, the jury found Mr. Madison guilty of capital murder. It was undisputed at the penalty phase of trial that Mr. Madison suffered from a mental illness marked by paranoid delusions. This mitigating circumstance was established primarily through the testimony of defense expert Dr. Barry C. Amyx. (Doc. 11-4 at 2-44.) Dr. Amyx testified that Mr. Madison suffered from a delusional disorder; had experienced persecution delusions since he was a teenager; was out of touch with reality and unable to gather his thoughts; and could not appreciate fully the criminality of his conduct. (Doc. 11-4 at 7,9,13,16,25,43.) Dr. Amyx explained that Mr. Madison's struggles with mental illness had been observed since he was an adolescent, including by prison psychiatrists in Mississippi as documented in medical records introduced by the defense. (Doc. 11-4 at 2, 7.) To control his illness, Mr. Madison had been prescribed numerous anti-psychotic medications. (Doc. 11-4 at 10.)

Although the State called psychiatric expert Dr. Claude Brown to contest the *severity* of Mr. Madison's impairment, Dr. Brown agreed that

[2]This belies Petitioner's repeated assertions that Mr. Madison has never admitted killing the victim in this case.

Mr. Madison suffered from a mental illness "of a paranoid type." (Doc. 11-5 at 2, 7.) Dr. Brown did not refute the defense evidence that Mr. Madison had been diagnosed as mentally ill years earlier by prison psychiatrists in Mississippi or that he was required to take numerous psychotropic medications. (Doc. 11-5 at 2-7.)

After hearing this significant evidence concerning Mr. Madison's profound history of mental illness, the same death-qualified jury voted to sentence Mr. Madison to life imprisonment without parole. On July 7, 1994, Judge Ferrill McRae overrode the jury's verdict and sentenced Mr. Madison to death. Mr. Madison's case was affirmed on appeal, Madison v. State, 718 So. 2d 90 (Ala. Crim. App. 1997), aff'd, Ex parte Madison, 718 So. 2d 104 (Ala. 1998), and this Court denied certiorari review, Madison v. Alabama, 525 U.S. 1006 (1998).

Mr. Madison subsequently filed a petition for post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The Alabama Court of Criminal Appeals affirmed the dismissal of that petition without a hearing, Madison v. State, 999 So. 2d 561 (Ala. Crim. App. 2006), and the Alabama Supreme Court denied certiorari review.

On January 8, 2009, Mr. Madison timely filed his petition for habeas corpus relief pursuant to 28 U.S.C. § 2254. The district court denied relief, but the United States Court of Appeals for the Eleventh Circuit reversed the district court's denial in part on April 27, 2012, and remanded the case with instructions for the district court to conduct a Batson hearing. Madison v. Comm'r, Ala. Dep't of Corr., 677 F.3d 1333 (11th Cir. 2012). This Court denied the State's Petition for Writ of Certiorari on November 13, 2012. Thomas v. Madison, 568 U.S. 1019 (2012). On April 25, 2013, the district court again denied Mr. Madison's petition for habeas corpus relief, and the United States Court of Appeals for the Eleventh Circuit affirmed that denial on August 4, 2014. Madison v. Comm'r, Ala. Dep't of Corr., 761 F.3d 1240 (11th Cir. 2014). This Court denied certiorari review on March 23, 2015. Madison v. Thomas, 135 S. Ct. 1562 (2015). This Court denied Mr. Madison's petition for rehearing on May 18, 2015. Madison v. Thomas, 135 S. Ct. 2346 (2015).

B. PROCEEDINGS BELOW

On January 22, 2016, the State of Alabama moved the Alabama Supreme Court to set an execution date for Mr. Madison. On February 12,

2016, before the Alabama Supreme Court scheduled the execution, Mr. Madison's counsel filed a petition in the Mobile County Circuit Court pursuant to Alabama Code § 15-16-23, moving the trial court to stay Mr. Madison's execution because, as a result of his dementia, strokes, and cognitive decline, Mr. Madison no longer understands why the State is attempting to execute him and he is incompetent to be executed under the Eighth and Fourteenth Amendments. On February 15, 2016, Mr. Madison's counsel moved the Alabama Supreme Court to delay setting an execution date until after Mr. Madison's competency claim had been adjudicated. Nevertheless, on March 3, 2016, the Supreme Court of Alabama ordered that Thursday, May 12, 2016, be set as the date for Mr. Madison's execution.

On March 15, 2016, the Mobile County Circuit Court judge determined that Mr. Madison had made a preliminary showing of incompetency, ordered that he be evaluated by a court-appointed expert,[3]

[3] The court-appointed psychologist was Dr. Karl Kirkland, who had a long-standing contract with the State of Alabama. (Doc. 8-1 at 68.) Subsequent to the oral argument in this case, Dr. Kirkland was arrested and charged with multiple counts of Unlawful Possession or Receipt of a Controlled Substance in conjunction with forging a prescription on April 18, 2016, just four days after Mr. Madison's competency hearing.

and scheduled a hearing on Mr. Madison's § 15-16-23 petition, which occurred on April 14, 2016.

At the hearing, the submitted evidence established that Mr. Madison suffers from a major vascular neurological disorder, see Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 621 (5th ed. 2014) (hereinafter "DSM-5"), or vascular dementia, which was caused in part by a thalamic stroke he suffered in January, 2016. (Doc. 8-1 at 101-02, 107.) Both Dr. Kirkland and Dr. John Goff, a licensed neuropsychologist who, at Mr. Madison's request, conducted extensive neuropsychological testing and evaluated Mr. Madison's competence to be executed, agreed that Mr. Madison's cognitive and bodily functioning has declined significantly as a result of several strokes he has suffered over the past couple of years, as well as other medical conditions with which he is afflicted. (Doc. 8-1 at 74, 105, 108-09; Doc. 8-3 at 9-10, 19.)

Dr. Kirkland did not dispute the diagnosis of dementia. (Doc. 8-1 at

http://www.wsfa.com/story/32792305/montgomery-psychologist-charged-with-using-forged-prescription. Dr. Kirkland was suspended from the practice of psychology on September 9, 2016. See Ala. Bd. of Exam'r in Psychology, Psychologist Search or License Verification, www.psychology.state.al.us/licensee.aspx (search "Karl Kirkland") (last visited Sept. 5, 2017).

123-24.)

On January 4, 2016, Mr. Madison was found unresponsive in his prison cell and fecally incontinent after suffering a thalamic stroke,[4] which necessitated transfer from Holman Prison and outside hospitalization. (Doc. 11-32 at 25; Doc. 11-60 at 13.) This thalamic stroke is particularly relevant to Mr. Madison's competency because it resulted in significant memory loss. (Doc. 8-3 at 19; Doc. 8-1 at 101-04.) The thalamus is a "connection organ" that links the limbic system in the lower area of the brain to the frontal lobes, (Doc. 8-1 at 101-02), and when the thalamus is damaged, "the most common thing" that results is memory loss. (Doc. 8-1 at 102; Doc. 8-3 at 19.)

Consistent with that pattern, Mr. Madison suffers from vascular dementia and resulting retrograde amnesia. (Doc. 8-3 at 19; Doc 8-1 at 102, 107.) Clinical features of vascular dementia, or vascular neurological disorder, include the onset of cognitive deficits, like memory loss, that are temporally related to a cerebrovascular event, such as a stroke. DSM-5 at 621; (Doc. 8-1 at 107-108). In this case, Mr. Madison's retrograde amnesia

[4]MRI imaging on January 4, 2016, confirmed this thalamic stroke. (Doc. 11-60 at 13.)

has meant that his episodic memory – memory related to events that happened to him in the past – has significantly declined. (Doc. 8-3 at 19.)

Consequently, Mr. Madison cannot remember numerous events that have occurred over the past 30 years. (Doc. 8-3 at 19.) Critically, he cannot independently recall the facts of the offense for which he was convicted or the previous legal proceedings in his case. (Doc. 8-3 at 19; Doc. 8-1 at 110.) Dr. Goff's examination revealed that Mr. Madison was unable to recollect the sequence of events from the offense to his arrest or to his trial, and could not recall the name of the victim. (Doc. 8-3 at 18-19.) Ultimately, Dr. Goff concluded that Mr. Madison does not "seem to understand the reasoning behind the current proceeding as it applies to him" and does not understand why he is scheduled to be executed by the State. (Doc. 8-3 at 19-20; Doc. 8-1 at 110, 119-20.)

Dr. Goff's neuropsychological testing revealed that Mr. Madison has an IQ score of 72, which places him in the borderline range of intelligence and is a significant decline from his previous scores, (Doc. 8-3 at 17, 20, Doc 8-1 at 97), and that he has a Working Memory Score of 58,

demonstrating severe memory deficits,[5] (Doc. 8-3 at 17, Doc. 8-1 at 97-98). Dr. Goff's testing revealed additional evidence of Mr. Madison's memory impairments: Mr. Madison could not recall any of the 25 elements in a brief story vignette Dr. Goff read him, could not remember the alphabet past the letter G, could not perform serial three additions, could not remember the name of the previous United States President, named Guy Hunt as the governor of Alabama, and could not remember the name of the Warden at Holman Correctional Facility, where he has been incarcerated for over 30 years.[6] (Doc. 8-3 at 16.) There is also evidence Mr. Madison has difficulty processing information. During the examination, Dr. Goff noted that Mr. Madison was unable to rephrase simple sentences and was unable to perform simple mathematical calculations. (Doc. 8-3 at

[5]The Working Memory Index is scored on a scale that is similar to an IQ test in which 100 is the mean and the standardization is 15. (Doc. 8-1 at 98.) As Dr. Goff explained in his report, Mr. Madison's "memory skills in regard to working memory fall within the severely impaired range with scores comparable to IQ test scores in the 50's" thereby placing him "within the borderline to intellectually disabled range" (Doc. 8-3 at 19); akin to the functioning of an individual for whom the death penalty has been held to be categorically unavailable under the Eighth Amendment, see Atkins v. Virginia, 536 U.S. 304 (2002).

[6]Dr. Kirkland testified that Mr. Madison was only *partially* oriented to time and place. (Doc. 8-1 at 74-75; Doc. 8-3 at 8.)

18.) Dr. Goff concluded that these deficits likely resulted, at least in part, from the January stroke. (Doc. 8-3 at 19.)

Prior to this January stroke, Mr. Madison had suffered other strokes that have contributed to his cognitive decline. (Doc. 8-1 at 74-75, 104-07.) These strokes include a basilar artery occlusion, causing bilateral cerebral and occipital infarctions, in May 2015[7] that resulted in increased brain pressure, white matter attenuation, and possible temporal lobe damage, which can cause memory difficulties.[8] (Doc. 8-3 at 13, Doc. 8-1 at 104-05.) In the aftermath of the stroke, Mr. Madison was in an "altered mental status," (Doc. 8-3 at 13; Doc 11-28 at 43), and deemed to have a diminished ability to comprehend. (Doc. 11-30 at 14.) He was also unaware of where he was or why he was there and appeared confused. (Doc. 11-30 at 32, 36.) His speech was slurred, he exhibited signs of an impaired memory, and he could not remember the officers who were

[7]Records indicate that Mr. Madison suffered strokes prior to the May 2015 incident which negatively impacted his cognitive and bodily functioning. (Doc. 8-3 at 19; Doc. 8-1 at 104.)

[8]As a result, Mr. Madison was taken to the ICU and a neurosurgeon was placed on standby due to a high risk of fatal brain herniation. (Doc. 11-28 at 46.)

guarding him, whom he had known for years. (Doc. 11-30 at 36, 39; see also Doc. 8-3 at 16, 19.)

As a result of these multiple strokes, Mr. Madison also suffers from encephalomalacia, (Doc. 11-60 at 41, 49, 141; Doc. 8-1 at 106), which means that there are areas of his brain where the tissue is dead. (Doc. 8-1 at 106-07.) MRI imaging in January 2016 depicted encephalomalicia in the occipital lobes and cerebellar hemispheres. (Doc. 11-60 at 13; see also Doc. 8-1 at 106-07.)

In addition to the strokes, Mr. Madison suffers from multiple medical conditions that, over the years, have led to worsening cognitive capacity, including Type 2 Diabetes, chronic hypertension, and chronic small vessel ischemia.[9] (Doc. 8-3 at 9, 19; Doc. 8-1 at 73-74, 105-06.) Mr. Madison also suffers from occipital angioma – an abnormal collection of blood vessels – which likely contributed to his strokes and debilitating headaches. (Doc. 11-23 at 18.) Furthermore, both experts agree that Mr.

[9]This type of ischemia, also known as "cerebral small vessel disease," is a "leading cause of cognitive decline." John G. Baker et al., Cerebral Small Vessel Disease: Cognition, Mood, Daily Functioning, and Imaging Findings from a Small Pilot Sample, 2.1 Dementia & Geriatric Cognitive Disorders 169 (2012), available at http:// www. ncbi. nlm.nih.gov/ pmc/ articles/PMC3347879/#.

Madison now speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain. (Doc. 11-34 at 59; Doc. 8-1 at 73-74, 92-93, 104-105.)

Members of Mr. Madison's legal team observed changes in his mental functioning and ability to communicate that are consistent with the symptoms of these medical diagnoses: a precipitous decline in his functioning in January of 2016, (Doc. 8-1 at 21, ¶ 10); slurred and halting speech, (Doc. 8-1 at 21-22, ¶ 11); struggling to retain basic information and repeating questions and conversations without any awareness of having had the conversations previously, (Doc. 8-1 at 22, ¶ 13; 25, ¶ 8); an increasing focus on a limited number of familiar topics; and nonsensical speech. (Id.)

Mr. Madison also exhibited a profound level of disorientation and confusion. For example, he rarely leaves his bed and expresses confusion about where he is. He reported frequently urinating on himself because "no one will let me out to use the bathroom," despite the fact that Mr. Madison has a toilet just inches from his bed, inside of his cell. (Doc. 8-1

at 22, ¶ 12.) He has also exhibited signs of confusion while communicating with his attorney, at one point asking a question about an in-person meeting he believed occurred the previous day, when in fact his attorney had not seen him for several months. (Doc. 8-1 at 25, ¶ 7.) During a legal visit in February 2016, he indicated confusion about the status of his case, stating that he plans to move to Florida or live abroad after he is released from prison. (Doc. 8-1 at 24-25, ¶¶ 4, 9.) Additionally, Mr. Madison has presented as increasingly and uncharacteristically disheveled, wearing a visibly soiled uniform, covered in stains and hair shavings, and, on his bare feet, wearing plastic shower sandals that did not match. (Doc. 8-1 at 21-22, ¶ 11.) In subsequent visits, his hygiene continued to deteriorate. (Doc. 8-1 at 25, ¶ 10.)

At the hearing in the state trial court, Mr. Madison appeared in a wheelchair as a "physically ill individual" and it was not clear that he followed anything that occurred at the hearing. (Doc. 8-2 at 157.)

Dr. Kirkland testified and agreed that Mr. Madison suffered significant cognitive and bodily decline as a result of these strokes, and did not dispute Dr. Goff's DSM-5 diagnosis. (See Doc. 8-1 at 123 ("I think

Dr. Goff's testimony reflects his training in neuropsychology, and I'm sure what he had to say is accurate.").) Nothing in his report indicated that he had probed the extent of Mr. Madison's understanding of his execution; when the state trial judge questioned him at the hearing about whether he had an "understanding or opinion as to whether Mr. Madison understands that the State is seeking retribution against him for an act that he committed in the past," Dr. Kirkland responded only that Mr. Madison, "talked specifically about death sentence versus life without in the original trial and the first retrial and in the second." (Doc. 8-1 at 124.) Similarly, when asked by counsel for the State about whether Mr. Madison had knowledge of his execution, Dr. Kirkland testified that Mr. Madison "understands that that is, as applied to him, that he has two choices or two sentences that are – that are there; one being execution and one being life without parole." (Doc. 8-1 at 78-79.) Dr. Kirkland could not explain why he did not include this information in his written report, (Doc. 8-1 at 80-81), or that such information was actually not true: at no point in his appeals has the sentence of life without parole been available to Mr. Madison. Dissenting Judge Jordan acknowledged the paucity of Dr.

Kirkland's evaluation, Madison v. Comm'r, Ala. Dep't. of Corr., 851 F.3d 1173, 1194 (11th Cir. 2017), noting that he found Dr. Goff's opinion persuasive. Id. at 1193.

On April 29, 2016, the Mobile County Circuit Court denied Mr. Madison's §15-16-23 petition. In its order, the state court did not consider or even cite to Mr. Madison's diagnosed dementia, (Doc. 8-2 at 149-58), even though this diagnosis was never disputed by the court-appointed expert, Dr. Kirkland, (Doc. 8-1 at 123-24).

Pursuant to Ala. Code § 15-16-23, appellate review of that decision in the Alabama state courts was unavailable. (Doc. 13 at 8); see also Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995). On May 4, 2016, Mr. Madison filed a petition for habeas corpus and a motion for a stay of execution in the United States District Court for the Southern District of Alabama. (Doc. 1-2.) On May 10, 2016, the district court denied Mr. Madison's habeas petition and motion for a stay. (Doc. 13-14.) On May 12, 2016, the Eleventh Circuit Court of Appeals granted Mr. Madison's motion for a certificate of appealability, stayed the execution, and ordered expedited briefing and oral argument in the case. (See Doc. 20 (attached

as Appendix A).)[10]

In its March 2017 decision reversing the district court, the Eleventh Circuit Court of Appeals identified the proper standard of review, noting that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "imposes a 'highly deferential standard for evaluating state-court rulings.'" Madison, 851 F.3d at 1182 (citing Renico v. Lett, 559 U.S. 766, 773 (2010)). The lower court then correctly identified Ford v. Wainwright and Panetti v. Quarterman, this Court's controlling precedent on competency-to-be-executed claims, specifically noting Justice Powell's articulation that the "Eighth Amendment forbids the execution of 'those who are unaware of the punishment they are about to suffer and why they are to suffer it,'" id. at 1184, and this Court's decision in Panetti, clarifying that the requisite awareness required by Ford "was tantamount to a 'rational understanding' of the connection between a prisoner's crimes and his execution,'" id. (citing Ferguson v. Sec'y. Fla. Dep't. of Corr., 716 F.3d 1315, 1336 (11th Cir. 2013)). While "mindful of the great deference due to

[10]Petitioner attached the incorrect version of the lower court's order, see Pet. at 87a. The correct version is attached to this document as Appendix A.

state court decisions on federal habeas review, particularly when the state court is applying a general standard like the one in Panetti," Madison, 851 F.3d at 1178, the lower court concluded that the state trial court's decision was an unreasonable determination of the facts "because the court refused to consider undisputed evidence of [Mr. Madison's] diagnosed dementia and corresponding memory deficits," id. at 1185, and an unreasonable application of clearly established law because the state court failed to "examine the prisoner's understanding of the connection between his crime and his execution," id. at 1188. After undertaking a *de novo* review of the claim, the lower court determined that although it is "undisputed that Mr. Madison understands that his execution will result in his death," the evidence established that "Mr. Madison lacks a rational understanding of the link between his crime and his execution," and he is therefore incompetent to be executed. Id. at 1189-90.

Judge Jordan agreed with the majority of the lower court that the Eighth Amendment prohibited Mr. Madison's execution:

> After reviewing the record, I believe that Vernon Madison is currently incompetent. I therefore do not think that Alabama can, consistent with the Constitution, execute him at this time for his murder of a police officer three decades ago. See

> generally Panetti v. Quarterman, 551 U.S. 930, 958 [] (2007) (explaining that a state cannot put to death a prisoner who 'cannot reach a rational understanding of the reason for the execution').

Id. at 1190 (Jordan, J., dissenting), though he ultimately dissented, albeit reluctantly, with regard to the AEDPA analysis, see id. at 1190, 1194.

REASONS FOR DENYING THE WRIT

A. THE ELEVENTH CIRCUIT'S DECISION REPRESENTS THE PROPER APPLICATION OF LAW TO FACTS IN DETERMINING THE UNREVIEWED STATE COURT DECISION TO BE AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AND AN UNREASONABLE DETERMINATION OF FACTS.

As the opinion below makes quite clear, the Eleventh Circuit correctly applied this Court's holdings in Ford v. Wainwright, 477 U.S. 399 (1986), and Panetti v. Quarterman, 551 U.S. 930 (2007), to this case – where the facts establish that as a result of significant strokes, including a thalamic stroke in January 2016, as well as serious medical conditions, all of which are documented in the medical records submitted to the courts below, 67-year-old Vernon Madison has been diagnosed with a vascular neurological disorder, or vascular dementia, and continues to suffer a decline in cognitive functioning and significant memory deficits which

prevent him from having a rational understanding of why he is scheduled to be executed by the State of Alabama – to find that it was unreasonable for the trial court to decline to find Mr. Madison incompetent to be executed because it improperly restricted the scope of its competency review and improperly credited irrelevant expert evidence put on by the State. Madison v. Comm'r., Ala. Dep't. of Corr., 851 F.3d 1173, 1185-90 (11th Cir. 2017).

Contrary to the Petitioner's suggestion that the Eleventh Circuit does not understand Panetti or the deference required under AEDPA, the Eleventh Circuit has previously applied Panetti to deny relief in the context of a competency-to-be-executed claim.[11] See Ferguson v. Sec'y, Fla. Dep't. of Corr.,716 F.3d 1315, 1338 (11th. Cir 2013) (upholding Florida state court ruling that condemned prisoner competent to be executed, despite diagnosis of paranoid schizophrenia with delusions, because delusions did not interfere with his "rational understanding" of impending

[11] Indeed, no judge in active service on the Eleventh Circuit Court of Appeals believed the panel's decision to be so "demonstrably incorrect," Pet. at 18, as to require that the court be polled when Petitioner moved for rehearing en banc. App. 84a. Rehearing was denied.

execution and reason for it); see also 716 F.3d at 1344 (Wilson, J., concurring in result) (agreeing that court must "defer to the Florida Supreme Court's finding" and concurring in denial of habeas corpus relief).

Nor has the Eleventh Circuit had past difficulty adhering to its duty of deference under AEDPA to preserve norms of finality and federalism in competency-to-be-executed cases. See, e.g., id. at 1338 (finding Florida's competency standard "not inconsistent with clearly established federal law"), cert. denied, 134 S. Ct. 33 (2013); In re Medina, 109 F.3d 1556, 1565 (11th Cir. 1997) (holding prisoner not entitled to file successive habeas petition to pursue Ford claim), cert. denied, 520 U.S. 1151 (1997); In re Provenzano, 215 F.3d 1233, 1235 (11th Cir. 2000) (rejecting application to file successive petition to pursue Ford claim), cert. denied, 530 U.S. 1256 (2000).

Here, the Eleventh Circuit applied Ford in precisely the way this Court ruled it should be applied in Panetti: both the Eleventh Circuit and this Court in Panetti corrected state court rulings that were unreasonable because they were "improperly restrictive." Madison, 851 F.3d at 1189 ("A closer look at the competency standard rejected by the Supreme Court in

Panetti as 'too restrictive' makes this obvious.").

First, with regard to the state trial court's determination of the facts, the lower court evaluated the record evidence and determined that 1) Mr. Madison "has a serious mental condition"; 2) "Dr. Goff's testimony that Mr. Madison does not remember committing the murder is . . . unrefuted"; 3) "as a result of his mental disorder, Mr. Madison does not rationally understand the connection between his crime and his execution"; and that 4) because "Dr. Kirkland's report and testimony include no indication that he evaluated whether Mr. Madison understood this connection at all," the state trial court's finding that Mr. Madison has a "'rational [] understanding . . . that he is going to be executed because of the murder he committed' is not supported by the record and is therefore plainly unreasonable." Id. at 1185-87. This was plainly a proper application of the law to the facts in this case. See Brumfield v. Cain, 135 S. Ct. 2269, 2277 (2015) (state court's failure to consider relevant evidence – IQ score of 75 and evidence of adaptive functioning deficits – in assessment of claim petitioner was intellectually disabled and therefore exempt from execution unreasonable).

Additionally, the lower court properly recognized that Panetti "plainly requires courts making competency determinations to analyze whether the prisoner understands 'the connection between his execution and the crimes for which he is going to be executed.'" 851 F.3d at 1189 (quoting Ferguson, 716 F.3d at 1318). In this case, "[g]iven the unrebutted evidence that Mr. Madison suffers from vascular dementia, has no memory of his capital crime, was not malingering during the experts' evaluations, and believes he has not killed anyone – as well as the utter lack of any testimony that Mr. Madison understands the connection between the murder he committed and his impending execution," the lower court determined that the record could not support the trial court's finding that Mr. Madison is competent to be executed. Id.

After determining that the Alabama trial court "unreasonably determined the facts relevant to Mr. Madison's claim and unreasonably applied controlling federal law," and as such the lower court did not "owe the state court's finding that Mr. Madison is competent to be executed deference under AEDPA," the lower court determined that "Mr. Madison lacks a rational understanding of the link between his crime and his

execution," and he is therefore "incompetent to be executed." Id. at1189-90; see Brumfield, 135 S. Ct. at 2277 ("[D]eference does not imply abandonment or abdication of judicial review, and does not by definition preclude relief." (internal quotation marks omitted)).

The lower court's straightforward, and proper, application of the controlling law to the specific facts of this case, dictated by the deference required by the AEDPA, is precisely the type of case this Court has generally avoided and certiorari should be denied. See Sup. Ct. R. 10 ("[C]ertiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

B. CERTIORARI IS INAPPROPRIATE TO REVIEW A DECISION THAT NEITHER CONFLICTS WITH PRECEDENT FROM THIS COURT NOR WITH DECISIONS FROM OTHER COURTS OF APPEAL OR STATE COURTS OF LAST RESORT.

Without addressing the unrefuted evidence of Mr. Madison's significant strokes, decline in cognitive and bodily functioning, and DSM-5 diagnosis of major vascular neurological disorder or vascular dementia, and faced with a lower court opinion that correctly identifies the

controlling precedent from this Court, engages in the proper analysis to determine the deference required by the AEDPA, and rightly applies the law to the specific facts of the case, Petitioner is left to argue that the lower court erred in applying the Ford/Panetti rule to Mr. Madison's case because this Court has not addressed those precise facts in the context of a competency claim, or, alternatively, that this "misappli[cation]" of Ford and Panetti conflicts with decisions from other courts. Pet. at 13.[12] But neither of these arguments can be squared with what the lower court actually did below and Petitioner's misrepresentations should not now

[12]Petitioner repeatedly diminishes the import of the uncontested diagnoses here – see, e.g., Cert. Pet. at 12 ("inmate who does not remember or otherwise acknowledge committing murder"); 12 ("Madison claims he forgot the murder he committed"); 16 ("memory problems"); 21 ("memory problems") – in an attempt to place Mr. Madison's case outside the parameter of Panetti's rule, individuals who "fail to understand" why they are to be executed for "reasons other than those stemming from a severe mental illness." Pet. at 12, 13. But the undisputed evidence of Mr. Madison's multiple strokes, encephalomalacia, and the associated physical, cognitive and neuropsychological deficiencies is well-documented in the record and the resulting DSM-5 diagnosis of vascular neurological disorder, or vascular dementia, is unrefuted by even the State's own expert. And no amount of semantic subterfuge can change the fact this Court in Panetti drew no line whatsoever around a particular mental health diagnosis, choosing instead to state the obvious: a mental disorder is different from "a misanthropic personality or an amoral character." 551 U.S. at 960.

form the basis for this Court's review.

In support of its argument that the lower court decision is contrary to this Court's precedent and that certiorari is therefore appropriate, Petitioner cites to White v. Woodall, 134 S. Ct. 1697 (2014), and Virginia v. LeBlanc, 137 S. Ct. 1726 (2017) – yet each involves a lower court taking a legal rule from this Court's precedent and *extending* it to the factual scenario presented. Because the lower court here correctly *applied* the legal rule from controlling Supreme Court precedent to the unique facts of Mr. Madison's case, neither case is relevant nor helpful here.

In White, this Court reversed the Sixth Circuit Court of Appeals' grant of habeas corpus relief based upon the trial court's refusal to give a no-adverse-inference instruction at the penalty phase of a capital trial when the controlling Supreme Court precedent – Carter v. Kentucky, 450 U.S. 288 (1981) – limited such a requirement to the guilt/innocence phase. 134 S. Ct. at 1702-03. While recognizing that "state courts must reasonably apply the rules 'squarely established' by this Court's holdings to the facts of each case," id. (citing Knowles v. Mirzayance, 556 U.S. 111, 122 (2009)), this Court found that Section 2254 provides a remedy only for

"instances in which a state court unreasonably *applies* this Court's precedent," it does not, however, "require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." Id. at 1706.

Similarly, in LeBlanc, this Court found that the Fourth Circuit Court of Appeals erred in finding that the state court decision – holding that Virginia's geriatric release program complied with Graham [v. Florida, 560 U.S. 48 (2010)]'s requirement that juvenile offenders convicted of nonhomicide offenses be given "some meaningful opportunity to obtain release" – was an "unreasonable application" of the law for purposes of § 2254(d)(1), where this Court had by its own statement in Graham explicitly left this issue to the states. 137 S. Ct. at 1727-30 (noting the "legal quagmire" created by the Fourth Circuit ruling and finding "[t]he Court in Graham left it to the States, 'in the first instance, to explore the means and mechanisms for compliance' with the Graham rule." (quoting Graham, 560 U.S. at 75)).

In contrast, in this case, the Eleventh Circuit found unreasonable an unreviewed state court ruling that employed a general competency

standard that was too restrictive and that unreasonably relied upon irrelevant expert testimony, employing the same analysis, addressing the same issue, and ultimately coming to the same conclusion as the relevant controlling Supreme Court precedent, Panetti.[13] As this Court made clear in Panetti, "that the standard is stated in general terms does not mean the application was reasonable. AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" Panetti, 551 U.S. at 953 (quoting Carey v. Musladin, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment)). As such, certiorari is not appropriate on this basis.

Nor is Petitioner's assertion that certiorari is necessary because lower courts are split on "whether a state can execute an inmate who does not remember or otherwise acknowledge committing murder" persuasive. Pet. at 12. In fact, what Petitioner mischaracterizes as a "split" is actually a collection of various federal circuit court and state court decisions

[13]Indeed, in the context of competency, an alternative reading, now espoused by Petitioner, would preclude relief in every case where the specified DSM diagnosis differed from that identified in Panetti, an absurd result not mandated by AEDPA, this Court's precedents, or the Eighth Amendment.

applying the same clearly established law to differing facts, precisely the type of fact-specific case in which this Court is most inclined to deny certiorari. Sup. Ct. R. 10.

In Bedford v. Bobby, for example, the Sixth Circuit Court of Appeals analyzed a competency-to-be-executed claim brought seven days before the scheduled execution. 645 F.3d 372, 377 (6th Cir. 2011). After concluding that a stay of execution should have been denied on "this ground alone," the lower court concluded that the state court reasonably determined that Mr. Bedford "had not made a 'substantial threshold showing' that he lacked a rational understanding of the 'punishment [he is] about to suffer and why [he is] to suffer it.'" Id. at 378 (quoting Panetti, 551 U.S. at 949). Rather, the lower court found that while the defense presented evidence to the state courts that Mr. Bedford suffered from "the onset of a dementia[-] form illness," and an impaired memory, "[e]ven on their own terms, the statements in these affidavits do not establish that Bedford does not understand the reasons for his conviction or the nature of his punishment," such that the state court decision was unreasonable. Id. Far from adopting a rule that "memory and acknowledgment of the crime" is

"irrelevant," Pet. at 14, the lower court simply applied the Ford/Panetti rule to the facts of the case to conclude that the state court had reasonably concluded that Mr. Beford "had not made a substantial threshold showing of incompetence that would entitle him to additional process," id. at 380.

Likewise, in Simon v. Fisher, 641 F. App'x 386 (5th Cir. 2016), the Fifth Circuit applied Panetti's "'rational understanding' test" id. at 389, to analyze Mr. Simon's claim that he was incompetent to be executed due a head injury,[14] id. at 387. Though the defense expert, Dr. John Goff,[15] submitted a report opining that Mr. Simon exhibited signs of "global

[14]In contrast to this case, in Simon the "medical records are sparse and do not actually diagnose Simon with a head injury." 641 F. App'x at 387 n.2.

[15]Petitioner claims the Simon case to be "important" in part because the defense expert in that case was Dr. John Goff, the same expert who testified on Mr. Madison's behalf. Pet. at 16. While Petitioner makes much of Dr. Goff's opinion (stated in an affidavit; he did not testify at the competency hearing on Mr. Simon's behalf) that Mr. Simon suffered from "global amnesia" as a result of a head injury, see Pet. at 16, what Petitioner fails to include is the "salient fact" that Dr. Goff "reported that Simon was either malingering memory deficits or, generously stated, that he could not rule out malingering as an explanation for Simon's behavior." Simon, 641 F. App'x at 389. Far from "disbeliev[ing] Dr. Goff" as the State suggests, Pet. at 16, the district court and the Fifth Circuit actually considered all of this testimony – including Dr. Goff's opinion that Mr. Simon may have been malingering – when concluding that habeas relief was not warranted. 641 F. App'x. at 389-90.

amnesia," he made clear that this was a "'functional condition' not a neurophysicological one"; moreover, "he could not rule out . . . malingering." Id. Dr. Goff was not called to testify by the defense at the hearing, and the State's evidence – through the testimony of an expert and a prison guard – was that Mr. Simon was malingering. Id. at 388-90. Relying on all of this evidence, including Dr. Goff's report that Mr. Simon may have been malingering, the Fifth Circuit held that the district court did not err in finding that Simon was competent to be executed. Id. at 390.

Likewise, the "rational understanding" standard of Panetti was applied by the Tennessee Supreme Court in State v Irick, 320 S.W.3d 284 (Tenn. 2010). In that case, the state court noted that an expert had concluded that Mr. Irick had no memory impairment and that he had asserted that the victim's father was the one who actually committed the murder. Id. at 296. Based on this information and other evidence, the state court held that Mr. Irick had a rational understanding of his execution and that the trial court did not err in concluding that he was competent to be executed. Id. at 297, 298.

Lastly, Petitioner cites two cases out of Missouri, in support of an

asserted "split" in the lower courts. In State ex. rel. Middleton v. Russell, the Missouri Supreme Court evaluated the defendant's claim that he was incompetent to be executed because he had "developed certain beliefs about his charges and the resulting legal proceedings that are distorted by this paranoia, and may now be indicative of a psychotic delusional disorder." 435 S.W.3d 83, 84 (Mo. 2014) (en banc). Relying on Panetti's "rational understanding" standard, the state court reviewed the record and concluded that Mr. Middleton's beliefs were in line with arguments his attorneys had asserted to defend him and did not "make Middleton delusional in the way that renders him incompetent to be executed under the Eighth Amendment." Id. at 84-85.

Quoting extensively from the portion of Middleton that discusses Panetti, the Missouri Supreme Court followed Middleton's lead in utilizing Panetti's "rational understanding" standard to evaluate a claim that the defendant, Mr. Clayton, was incompetent to be executed because he expressed a belief that God was going to deliver him from execution. State ex rel. Clayton v. Griffith, 457 S.W.3d 735, 745 (Mo. 2015). In holding that Mr. Clayton failed to make a threshold showing of incompetency, the state

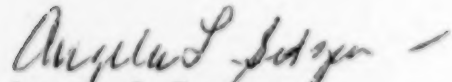
court noted that "religious faith and delusion" are not synonymous and that Mr. Clayton's case was distinguishable from Panetti because the inmate in Panetti "genuinely believed the true purpose behind his execution was not as punishment for a crime, but to stop him from preaching." Id. at 745.

Because each of these courts unquestionably applied the "rational understanding" standard set out by this Court in Ford and Panetti to the specific facts of each case and did not err in applying that standard, no split of authority exists and certiorari should be denied.

CONCLUSION

Vernon Madison is incompetent to be executed. In granting habeas corpus relief, the lower court correctly applied this Court's precedent to the facts of this case. Certiorari should be denied.

Respectfully Submitted,



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-12279-P

VERNON MADISON,

Petitioner – Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent – Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

Before WILSON, MARTIN and JORDAN, Circuit Judges.

BY THE COURT:

This order replaces that issued by the panel earlier today.

Petitioner Vernon Madison is an Alabama prisoner scheduled to be executed on May 12, 2016. He has filed a 28 U.S.C. § 2254 petition contending that he is mentally incompetent to be executed under Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595 (1986), and Panetti v. Quarterman, 551 U.S. 930, 127 S. Ct. 2842 (2007). The district court found that Madison properly filed his Ford claim in federal court but denied the claim on the merits. The district court found that

Madison had exhausted his Ford claim in state court as required by 28 U.S.C. § 2254(b)(1). It also noted that Madison's Ford claim was not barred as "second or successive" under 28 U.S.C. § 2244(b).

Madison moves for a certificate of appealability ("COA") so that he may appeal the denial of his § 2254 petition. He also seeks a stay of his execution pending appeal.

This Court may issue a COA from the denial of a § 2254 petition "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires a demonstration that "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003).

The Supreme Court has held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." Ford, 477 U.S. at 409 10, 106 S. Ct. at 2602. Then in Panetti the Court clarified that the prisoner must have "a rational understanding of the reason for the execution." 551 U.S. at 958, 127 S. Ct. at 2861. Madison alleges that as result of a series of strokes and other serious medical conditions, he suffers from vascular dementia, which has resulted in significant memory impairment, a decline in cognitive functioning, and

ultimately an inability to rationally understand why the State of Alabama is seeking to execute him. An Alabama trial court denied this claim. Madison did not appeal this decision because, as the Alabama trial court and the district court found, Alabama state law insulates the trial court's competency decision from review by any other Alabama court. See Ala. Code §15-16-23. Madison argues that the state court's decision that he is competent to be executed was contrary to or involved an unreasonable application of Panetti and Ford. Madison also argues that the state court's decision was based on an unreasonable determination of the facts because it failed to consider evidence of his dementia and related impairments.

The Supreme Court has observed that a Ford claim is unique from other constitutional claims that arise in capital cases because it becomes ripe for adjudication only when the petitioner's execution is imminent. See Stewart v. Martinez-Villareal, 523 U.S. 637, 644–45, 118 S. Ct. 1618, 1622 (1998); see also Panetti, 551 U.S. at 947, 127 S. Ct. at 2855 ("[C]laims of incompetency to be executed remain unripe at early stages of the proceedings."). This is therefore the first time that any state or federal court has had the opportunity to consider Madison's claim that his execution is prohibited by the Eighth Amendment. This claim could not have been raised before Madison's execution became imminent,

and only the Alabama trial court and the district court have reviewed Madison's claim.

Pursuant to Miller-El, Madison has satisfied § 2253(c)(2)'s standard. Madison's motion for COA is **GRANTED** as to the following issues:

> (1) Whether the state court's decision that Madison is competent to be executed is contrary to or involves an unreasonable application of clearly established federal law.
>
> (2) Whether the state court's decision that Madison is competent to be executed was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

"If a certificate of appealability is granted by the district court or by this court, the panel may grant a temporary stay pending consideration of the merits of the appeal if necessary to prevent mooting the appeal." 11th Cir. R. 22-4(a)(7); see also Ferguson v. Sec'y, Fla. Dep't of Corr., 716 F.3d 1315, 1330, 1344 (11th Cir. 2013) (granting temporary stay of execution under Rule 22-4(a)(7), denying state's motion to vacate the stay, and ultimately affirming the district court's denial of habeas relief after hearing oral argument on the merits of prisoner's Ford claim). Madison's death will render his appeal moot, and the Supreme Court has instructed that "a circuit court, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal when a condemned prisoner obtains a certificate of probable cause [now a certificate of appealability] on his initial habeas appeal." Barefoot v. Estelle, 463

U.S. 880, 893–94, 103 S. Ct. 3383, 3395 (1983); see also Lonchar v. Thomas, 517 U.S. 314, 319 20, 116 S. Ct. 1293, 1297 (1996) (holding that Barefoot applies to district courts considering initial habeas petitions). The Court therefore **GRANTS** Madison's Motion for Stay of Execution.

The Court directs the parties to brief the merits of the issues identified in the COA, pursuant to the following schedule: Petitioner shall file a brief on the merits by May 27, 2016. Respondent shall have until June 10, 2016, to file a response brief. Petitioner shall then have until June 17, 2016, to file a reply brief. The parties are directed to file the briefs electronically and to serve the briefs to opposing counsel electronically at the same time. Oral argument shall take place in Atlanta on June 23, 2016, at 9:00 a.m. EST. Counsel shall be given 30 minutes per side.

IT IS SO ORDERED.

No. 17-193

In the
Supreme Court of the United States

JEFFERSON DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Petitioner,
v.
VERNON MADISON,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF

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September 14, 2017

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ARGUMENT

Madison's brief in opposition makes all the conventional arguments, except two. Madison does not dispute that the questions presented are important or that this case is a good vehicle to answer them. As explained in the petition, this case has been to the Court before, with four Justices voting to vacate the lower court's decision to stay Madison's execution. And the added benefit of granting cert here is that the Court can resolve a recurring issue about competency to be executed after a full and fair review, instead of being forced to address the issue on expedited review of an execution-day motion. Madison does not disagree with any of this.

As for the arguments in Madison's brief, they reflect a reading of the Eleventh Circuit's decision that cannot be reconciled with even a cursory review of the opinion itself. The Eleventh Circuit did not enjoin Madison's execution because of some unique fact relating to Madison's health or the experts in this case. It plainly did so because it adopted a bright-line rule about memory: "a finding that a man with no memory of what he did wrong has a rational understanding of why he is being put to death is patently unreasonable." App. 28a. That bright-line rule, which the Eleventh Circuit emphasizes throughout its opinion,[1] has

---

[1] App. 20a ("Mr. Madison has no memory of his capital offense"); 20a ("the record includes no indication that Dr. Kirkland assessed whether Mr. Madison could remember the crime"); 21a ("Dr. Goff testified that Mr. Madison cannot remember the crime and doesn't believe he has killed anyone. Dr. Goff therefore concluded that Mr. Madison doesn't understand why he is going to be punished"); 24a ("Dr. Goff's testimony showed that Mr. Madison cannot remember his crime, doesn't believe he committed murder, and therefore cannot rationally connect his crime to his

never been adopted by this Court and cannot be applied under AEDPA. And that bright-line rule has been rejected by other courts, which have allowed states to execute prisoners who did not remember or otherwise acknowledge committing murder.

A. The lower courts are divided.

The lower courts are divided on whether an inmate can be executed if he does not remember or otherwise acknowledge committing murder. Madison argues that, what we characterize as a split, is really "a collection of various federal circuit court and state court decisions applying the same clearly established law to differing facts." BIO 31-32. That is a manifestly incorrect reading of these cases. Instead, as explained in the petition, the lower courts are reaching *opposite* results on the *same* facts because they disagree about the *Ford/Panetti* standard.

There is no cleaner split than the split between this case and the Sixth Circuit's decision in *Bedford v. Bobby*, 645 F.3d 372 (6th Cir. 2011). There, an expert opined that "[a]t the present time, [Bedford] has no actual memory of committing the offenses." *Bedford v. Bobby*, 2011 WL 1843281, at *6 (S.D. Ohio May 16, 2011). The inmate's "memory [wa]s severely impaired," he "lack[ed] intact memories of events," and his mental "condition has ... deteriorated ... with the onset of a dementia [-]form illness." *Bedford*, 645 F.3d at 378. Because of this dementia and associated lack of memory, Bedford's experts concluded that he was

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execution"); 26a-27a (the state "court never considered the impact of Mr. Madison's memory loss or his belief that he never killed anyone"); 27a ("Mr Madison cannot be deemed competent" because "he doesn't remember the crime and he believes, to the best of his ability, he has never killed anyone").

not competent to be executed. That is almost verbatim the same testimony that Madison's expert, Dr. Goff, offered here: "Dr. Goff testified that Mr. Madison cannot remember the crime and doesn't believe he has killed anyone. Dr. Goff therefore concluded that Mr. Madison doesn't understand why he is going to be punished or the act for which he is to be punished." App. 21a.

But the Eleventh Circuit and the Sixth Circuit held that this Court's caselaw compelled opposite results on the same facts. The Eleventh Circuit held that Madison's inability to remember his crime was dispositive: "Dr. Goff's testimony addressed the core question posed by *Panetti* . . . Mr Madison cannot be deemed competent" because "he doesn't remember the crime." App. 21a-22a, 27a. The Sixth Circuit held that the inmate's memory of the crime was irrelevant: "The Supreme Court has never held, much less suggested, that the failure to recall precise facts of an offense amounts to the kind of incompetence that prohibits the execution of a defendant." *Bedford*, 645 F.3d at 378-79.

Moreover, the Sixth Circuit held that the state court was *reasonable* for relying on the same kind of evidence that the Eleventh Circuit held that the state court *unreasonably* relied on in this case. The Sixth Circuit: "[a] state court could reasonably conclude" that the inmate had a rational understanding because he "could explain that if someone were 'on death row, they killed somebody'" and "suggested that different sentences may be handed down depending on the manner in which the victim was killed." *Id.* at 379. The Eleventh Circuit: the state court unreasonably relied on testimony "that Mr. Madison understands the procedural history of his case and is aware that he has

been sentenced to death" and can "distinguish between a death sentence and a life sentence." App. 22-23a.

Other courts have likewise held that an inmate had a rational understanding under *Ford/Panetti*, even though he could not remember committing a capital offense because of age or dementia. *See State ex rel. Clayton v. Griffith*, 457 S.W.3d 735, 750 (Mo. 2015) (although inmate has "several disorders," including "dementia," "traumatic brain injury," "a small stroke," and "possible age-related decline," he has a rational understanding under *Ford/Panetti* because he "understands that he is under the threat of execution, that this will result in his death"). The Court should resolve the split in this case instead of waiting to resolve it on an expedited motion for stay of execution in some later case.

B. The Eleventh Circuit's decision is wrong under AEDPA.

The Eleventh Circuit also flouted this Court's caselaw when it applied a new rule in a federal habeas proceeding governed by the Anti-terrorism and Effective Death Penalty Act ("AEDPA"). The Eleventh Circuit's bright-line rule—that an inmate "cannot be deemed competent" to be executed if "he doesn't remember the crime"—has most assuredly not been clearly established by this Court. App. 27a. Instead, the Court has intentionally declined to "attempt to set down a rule" that would govern competency determinations. *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007).

Madison does not defend the Eleventh Circuit's rule. Instead, he simply asserts, without analysis, that "the Eleventh Circuit applied *Ford* in precisely

the way this court ruled it should be applied in *Panetti*." BIO 24. But this Court in *Panetti* did not say that an inmate's failure to remember committing a crime means that he cannot be executed for the crime. And, as explained in the petition, a prisoner's memory and his "rational understanding" are obviously two different things. A history major can rationally understand the Vietnam War, even though he has no independent memory of it. Conversely, a Vietnam veteran may recall the war in vivid detail, but hold delusional beliefs about it. The Eleventh Circuit's bottom-line conclusion—that the state court was "patently unreasonable" to "find[] that a man with no memory of what he did wrong has a rational understanding of why he is being put to death"—lacks any support in law or logic. J.A. 28a.

For his part, Madison doubles down on the Eleventh Circuit's erroneous conflation of memory and "rational understanding." Throughout his brief, Madison contends that the mere fact he has been diagnosed with strokes and dementia-related amnesia means that he is necessarily incompetent to be executed. *See* BIO 11-15, 28 & n.12. But this diagnosis means only that Madison does not independently recall events from his past. *See* BIO 11 ("features of vascular dementia . . . include the onset of cognitive deficits, like memory loss") & 12 ("Madison's retrograde amnesia has meant that his episodic memory—memory related to events that happened to him in the past—has significantly declined"). *See also* App. 24a ("Mr. Madison cannot remember his crime, doesn't believe he committed murder"). Although we have no way of knowing if Madison has truly forgotten the crime he committed, no one disputes that Madison has experienced

decline over the years. But, because memory and rational understanding are not the same thing, Madison's memory problems do nothing to establish that he lacks a rational understanding of his death sentence. *See Bedford*, 645 F.3d at 378 ("even on their own terms," an inmate's amnesia claims "do not establish that [he] does not understand the reasons for his conviction or the nature of his punishment").

On the actual question of rational understanding, Madison's brief has nothing to say. For example, Madison does not dispute that he fails to meet the ABA's and APA's standards for incompetency to be executed, as we pointed out in the petition. Madison's own expert concluded that Madison "is able to understand the nature of the pending proceeding." Doc. 8-3, Tab R-14 at 8. He concluded that Madison "understands the sentence specifically the meaning of a death sentence." Doc. 8-3, Tab R-14 at 18. And he concluded that Madison understands that "the reason he was in prison was because of 'murder.'" Doc. 8-3, Tab R-14 at 7. Even Madison's responsibility-denying statement that he never "went around killing folks" demonstrates that he understands the crime for which he was convicted and the retributive nature of his sentence.

As explained in the petition, this case is on all fours with cases in which the Court has summarily reversed lower courts for granting habeas relief. Once again, Madison has no meaningful response. He argues that those cases involved "the lower court taking a legal rule from this Court's precedent and *extending* it to the factual scenario presented." BIO 29. In this case, Madison claims, the Eleventh Circuit merely "*applied* the legal rule from controlling Supreme Court precedent to . . . unique facts." BIO 29.

But our arguments are not about a factual distinction between this case and *Ford/Panetti*. The problem here is not that Madison suffers from a delusion that is different than the one at issue in *Panetti* or that his "DSM diagnosis differ[s]" from the diagnosis in *Ford*. BIO 29-30 & n. 13. Instead, it is undisputed that Madison is *not* insane. The issue here is one of law: Is a sane inmate incompetent to be executed if he does not remember or otherwise acknowledge committing murder? This Court has never answered that question, and the absence of clearly-established precedent is decisive under AEDPA.

C. Madison's brief relies on red herrings that do not support denying certiorari.

Lastly, there are four red herrings in Madison's brief that, although they warrant a clarifying response, are ultimately irrelevant to the question whether to grant the petition.

First, Madison begins his brief by recounting debunked assertions of psychosis and delusion from his trial 25 years ago. BIO 4-7. But it is undisputed at this point that Madison is not delusional or psychotic. Madison's own expert in this case testified that he agreed with the state court's expert that Madison is neither delusional nor psychotic:

> Q. Do you agree with [the court's expert], who testified that Mr. Madison is neither delusional or psychotic?
>
> A. I didn't see an indication of any of those conditions.

Doc. 8-1, Tab R-9 at 56 (testimony of Dr. Goff). The state court credited this testimony, expressly finding that Madison is not delusional. App. 83a. And Madison has never challenged that state-court finding at any point in this federal habeas proceeding. As the Eleventh Circuit explained, the "mental conditions relevant here" are "dementia and related memory loss," not psychosis or delusions. App. 25a.

Second, Madison says it is "critical[]" that he was sentenced to death by a judge at his third trial, instead of a jury. BIO 3-4. He ignores three things: (1) his first two trials ended with juries recommending a death sentence,[2] (2) Madison waived any objection to the judge's sentencing authority at his third trial,[3] and (3) this Court held in 1995 that judicial sentencing in capital cases is constitutional, *Harris v. Alabama*, 513 U.S. 504 (1995). In any event, whatever one thinks of judicial sentencing going forward, it is irrelevant to the question here: whether the state can carry out a death sentence that has been final since the 1990s because the inmate cannot remember committing murder. *See Brooks v. Alabama*, 136 S.Ct. 708 (Jan. 21, 2016) (Sotomayor, J., concurring in denial of petition for certiorari).

Third, Madison misleadingly suggests that he previously took responsibility for the murder because he "admit[ed] killing the victim in this case." BIO 6 & n.2. But, as explained in the cert petition, Madison

---

[2] *See Madison v. State*, 545 So. 2d 94, 95 (Ala. Crim. App. 1987) (the jury's vote was 11-1); *Madison v. State*, 620 So. 2d 62, 63 (Ala. Crim. App. 1992) (10-2).

[3] *See Madison v. State*, 718 So. 2d 90, 104 (Ala. Crim. App. 1997) ("The record reveals that the appellant did not object to the trial court's override of the jury's advisory verdict.").

has never accepted responsibility for *murdering* Officer Schulte and has instead always concocted various theories of innocence. *See also* App. 37a (Jordan, J., dissenting) ("Dr. Goff was not aware that Mr. Madison had never admitted that he was guilty of murder"). For example, before his second trial in 1990, Madison was already telling psychologists that "he could not remember the shooting." *Madison v. State*, 620 So. 2d 62, 66 (Ala. Crim. App. 1992). His current amnesia claim is just the latest iteration of the responsibility-denying story he has always told.

Fourth, without explanation, Madison asserts that "[t]he three decades Vernon Madison has spent on death row are a direct result of the State of Alabama's misconduct and its insistence on defending the misconduct for years and in multiple courts." BIO 3. Of course, the truth is that Madison is on death row because, after a career of violent crime, he murdered a police officer so that he could attack a woman the officer was protecting. Madison also ignores that it was the *state* courts that reversed his first two convictions, in a good faith effort to protect his constitutional and procedural rights.[4] In any event, Madison's third conviction and sentence have been final since the 1990s, *Madison v. Alabama*, 525 U.S. 1006 (1998), and have been affirmed by the federal courts in federal habeas, *Madison v. Thomas*, 135 S. Ct. 1562 (2015). It is hard to see the "misconduct" in securing or defending a valid conviction and sentence.

---

[4] We would also note that the career prosecutor who Madison accuses of misconduct is now the chief prosecutor of the U.S. Attorney's Office for the Southern District of Alabama and has been for over a decade. *See Madison v. Allen*, 2013 WL 1776073, at *6 (S.D. Ala. Apr. 25, 2013).

The Court should grant certiorari to resolve the split about competency to be executed. In the alternative, it should summarily reverse because the Eleventh Circuit erroneously applied a new rule in a federal habeas case. *See Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017) (recognizing that "[t]hese arguments cannot be resolved on federal habeas review" but that, by reversing, "the Court 'express[es] no view on the merits of the underlying" claim'").

Respectfully submitted,

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September 14, 2017

No. 17-193

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

JEFFERSON DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, Petitioner,

v.

VERNON MADISON, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR REHEARING

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November 16, 2017

CAPITAL CASE

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.1, Vernon Madison respectfully petitions for rehearing of the Court's per curiam decision issued on November 6, 2017. Dunn v. Madison, No. 17-193, 2017 WL 5076050 (Nov. 6, 2017). Mr. Madison moves this Court to grant this petition for rehearing and consider his case with merits briefing and oral argument. Pursuant to Supreme Court Rule 44.1, this petition for rehearing is filed within 25 days of this Court's decision in this case.

REASONS FOR GRANTING THE PETITION

Since the passage of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and up until the issuance of its opinion in this case, this Court has never issued a per curiam opinion, without briefing or argument, reversing a lower appellate court's grant of habeas corpus relief where the constitutional claim received *no* state appellate court review.[1] But that is precisely what happened here: Alabama created a statutory remedy for Eighth Amendment

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[1] See, e.g.,Virginia v. LeBlanc, 137 S. Ct. 1726, 1728 (2017) (per curiam reversal of habeas corpus relief where Graham claim first raised in state trial court and reviewed by Virginia Supreme Court); White v. Wheeler, 136 S. Ct. 456, 458 (2015) (per curiam reversal of habeas corpus relief where Witherspoon-Witt claim reviewed by Kentucky Supreme Court on direct appeal); Woods v. Donald, 135 S. Ct. 1372, 1375 (2015) (per curiam reversal of habeas corpus relief where ineffective assistance of counsel claim raised on direct appeal and rejected by Michigan Court of Appeals and Michigan Supreme Court).

competency-to-be-executed claims, Alabama Code Section 15-16-23, that relegated the decision of whether the Constitution prohibits an impending execution to a single, elected trial judge,[2] and then made that decision unreviewable by any state appellate court. See Ala. Code § 15-16-23 (prohibiting appellate review of trial court's competency finding); Weeks v. State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995) (Ala. Code § 15-16-23 "clearly states that a finding by the trial court on the issue of insanity, as it relates to this statute, is not reviewable by any other court").

This Court did not acknowledge Alabama's lack of any state appellate review for Mr. Madison's competency-to-be-executed claim when it applied the "demanding standard" of the AEDPA, Dunn, 2017 WL 5076050, at *1, and its summary disposition did not address the complicated questions about the parameters of habeas corpus law in the context of the unique procedural posture of this case. Rehearing is appropriate for this Court to consider the following substantial questions:

I. Should the Most Demanding Standard of Deference Under the AEDPA Apply to a Competency-to-be-Executed Claim Where No State Appellate Court Reviewed the Claim?

Alabama, alone among the states with a current death penalty, has

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[2] Circuit judges in Alabama run in partisan elections and are elected to a term of six years. Ala. Code §17-14-6.

affirmatively opted to preclude any state review – judicial or executive– of a trial judge's rejection of a prisoner's Eighth Amendment claim that he is incompetent to be executed. Of the 31 states that currently have a death penalty, only two, besides Alabama, explicitly prohibit appellate review of a competency-to-be-executed determination. See Allen v. State, 265 P.3d 754 (Okla. Crim. App. 2011) (no right to appeal trial court competency-to-be-executed determination);[3] Or. Rev. Stat. Ann. § 137.463 ("no appeal my be taken from an order issued pursuant" to statute governing competency hearings).[4] No other state prohibits appellate court review of a trial judge's rejection of a competency-to-be-executed claim and the vast majority of states provide appellate review of such claims

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[3] Oklahoma's procedures allow for more process than the statute in Alabama, however. There, if the warden determines that competency is at issue, a twelve-person jury is impaneled for a competency hearing at the trial court level. If the warden finds that the prisoner has not made a threshold showing of incompetency, the prisoner can petition the state trial court to review that determination via a writ of mandamus. Moreover, if the trial court agrees with the warden, the condemned prisoner can then appeal that decision to the Oklahoma Court of Criminal Appeals. Either way, a petitioner in Oklahoma is entitled to more extensive state court review of a competency claim than the determination of a single, elected state trial judge. See Cole v. Trammell, No. 15-CV-049-GKF-PJC, 2015 WL 4132828 at *4-5 (N.D. Okla. July 8, 2015) (staying petition to allow petitioner to exhaust available state court remedies for competency-to-be-executed claim).

[4] Oregon currently has a moratorium on the death penalty. See Oregon's New Governor Plans to Continue Death Penalty Moratorium, Death Penalty Information Center, http://deathpenaltyinfo.org/node/6060 (last visited Nov. 15, 2017).

either by statute or case law.[5]

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[5]See Ariz. Rev. Stat. Ann. § 13-4022 (within five days after superior court grants or denies motion for examination or rules whether prisoner is competent, either party may petition Arizona Supreme Court for review); Colo. Rev. Stat. Ann. § 18-1.3-1407 (within seven days after district court rules on motion raising issue of whether convicted person is mentally incompetent to be executed, either party may file for review with Colorado Supreme Court); Red Dog v. State, 620 A.2d 848, 850-51 (Del. 1993) (reviewing trial court's determination of defendant's competency-to-be-executed); Ferguson v. State, 112 So. 3d 1154 (Fla. 2012) (reviewing trial court's competency-to-be-executed finding); Ga. Code Ann. § 17-10-70 (unsuccessful applicant of competency-to-be-executed claim may appeal to Georgia Supreme Court within three days of entry of order denying relief); Timberlake v. State, 858 N.E. 2d 625 (Ind. 2006) (once Indiana Supreme Court determines competency-to-be-executed claim clears state habeas successor bar, petitioner is entitled to pursue claim under state post-conviction statute which provides for counsel at public expense and to return to trial court for competency determination subject to subsequent appellate review); Ky. Rev. Stat. Ann. § 431.2135 (court's determination of prisoner's competency-to-be-executed may be appealed to Kentucky Supreme Court by either party); La. Rev. Stat. Ann. § 15:567.1 (statute governing competency hearings states that "any party against whom a decision is rendered pursuant to this Section may make an appropriate application for a writ of certiorari or review directly to the Louisiana Supreme Court."); Miss. Code Ann. § 99-19-57 (circuit court's competency to-be-executed-determination "is a final order appealable under the terms and conditions of the Mississippi Uniform Post-Conviction Collateral Relief Act."); State ex rel. Cole v. Griffith, 460 S.W.3d 349, 356 (Mo. 2015) (state supreme court has jurisdiction to hear original habeas raising competency-to-be-executed claim); Calambro By & Through Calambro v. Second Judicial Dist. Court, 964 P.2d 794, 796 (1998) (reviewing district court's competency-to-be-executed claim filed via next friend petition); State v. Flowers, 558 S.E.2d 179 (N.C. 1998) (requiring trial court to certify order, transcript, and record to state supreme court within 20 days of entry of order in competency-to-be-executed claim); State v. Awkal, 974 N.E.2d 200, 204 (Ohio Ct. App. 2012) (defendant can appeal competency determination but state cannot appeal determination of incompetency in part because "[a] defendant's substantial right is affected when he or she is found to be competent for execution because obviously a defendant cannot raise the issue once executed."); Commonwealth v. Banks, 29 A.3d 1129, 1135 (2011) (initial competency-to-be-executed claims should be reviewed by state trial courts and

Thus, even though this was Mr. Madison's first opportunity to raise an Eighth Amendment challenge to his competency-to-be-executed under Panetti v. Quarterman, 551 U.S. 930, 958 (2007), and Ford v. Wainwright, 477 U.S. 399, 409-10 (1986),[6] the state trial judge's factual and legal determinations were not subject to review by any state appellate court. This procedural posture raises significant concerns about the reach of the "demanding standard" of the AEDPA, Dunn, 2017 WL 5076050, at *1.

Indeed, the principles of comity that undergird the AEDPA do not carry the same force where a state has declined to provide "full and fair" procedures for reviewing a constitutional claim.[7] See Ex parte Hawk, 321 U.S. 114, 118

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that expedited direct appellate review is available to review such claims); Singleton v. State, 437 S.E.2d 53, 60 (S.C. 1993) (determination that defendant is restored to competency reviewable by state supreme court); State v. Irick, 320 S.W.3d 284, 292 (Tenn. 2010) (trial court's ruling in competency-to-be-executed claim reviewable by state supreme court); Tex. Code Crim. Proc. Ann. art 46.05 (trial court's competency-to-be-executed finding appealable if motion was filed on or after 20th day before the defendant's scheduled execution date); State v. Harris, 789 P.2d 60, 72 (Wash. 1990) (creating judicial procedures for competency-to-be-executed claim and finding "there should be a discretionary review mechanism whereby the Superior Court's conclusion may be reviewed for error, and it is appropriate that this court review such cases directly").

[6] See Panetti, 551 U.S. at 946 ("claims of incompetency to be executed remain unripe at early stages of the proceedings"); Stewart v. Martinez-Villareal, 523 U.S. 637, 645 (1998) (competency to be executed claim not ripe until execution is imminent).

[7] See O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) ("This rule of comity reduces friction between the state and federal court systems by avoiding the

(1944) ("[W]here resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy . . . or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . a federal court should entertain his petition for habeas corpus, else he would be remediless." (internal citation omitted)); see also Castille v. Peoples, 489 U.S. 346, 350 (1989) ("federal habeas review will lie where state corrective processes are ineffective to protect the rights of the prisoner" (internal quotation marks omitted)).

Consistent with this view, circuit courts have recognized that "full and fair consideration" of a petitioner's Fourth Amendment claim in state court includes "at least one evidentiary hearing in a trial court and the availability of meaningful appellate review when there are facts in dispute, and full consideration by an appellate court when the facts are not in dispute." Lawhorn v. Allen, 519 F.3d 1272, 1287 (11th Cir. 2008) (citations omitted);[8] see also

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unseemliness of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." (internal quotation marks omitted)).

[8] Pursuant to Stone v. Powell, federal courts are barred from considering a petitioner's Fourth Amendment claim in habeas corpus where the state courts considered the claim fully and fairly. 428 U.S. 465, 489-93 (1978) ("The question is whether state prisoners who have been afforded the opportunity for full and fair consideration . . . by the state courts at trial *and on direct review* may invoke their claim again on federal habeas corpus review." (emphasis added)).

Willett v. Lockhart, 37 F.3d 1265, 1272-73 (8th Cir. 1994) ("As Stone suggests, a breakdown in the mechanism can occur in either the trial court or the state appellate court.").

In the context of determining whether an attorney's withdrawal from a case has deprived the defendant of his right to appellate counsel, this Court and other courts have recognized the importance of an independent review of the record by a state appellate court and discouraged "one tier" review. See Smith v. Robbins, 528 U.S. 259, 265, 281 (2000) (approving California's procedure, under which "[t]he appellate court, upon receiving a 'Wende brief,' must 'conduct a review of the entire record,' regardless of whether the defendant has filed a pro se brief"); Hughes v. Booker, 220 F.3d 346, 351 (5th Cir. 2000) ("Indeed, neither the Supreme Court nor this court has approved of a procedure for withdrawal of counsel that affords an indigent defendant only one level of review of the record for potentially meritorious appellate issues."); cf. Eskridge v. Wash. State Bd. of Prison Terms and Paroles, 357 U.S. 214, 216 (1958) (holding that one level of review – by trial judge only – "cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript"); Griffin v. Illinois, 351 U.S. 12, 18-19 (1956) ("All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt

or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts.")

Rehearing is appropriate for this Court to review Alabama's decision to insulate an arguably unconstitutional decision about whether Vernon Madison should be executed from any constitutional scrutiny, both because it results in the inconsistent application of the law, cf. Ornelas v. United States, 517 U.S. 690 (1996) (in Fourth Amendment context, "[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles"), and because it increases arbitrariness and the likelihood of error. See Jones v. Barnes, 463 U.S. 745, 756 n.1 (1983) (Brennan, J., joined by Marshall, J., dissenting) ("There are few, if any situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property . . . .").

II. Is Applying the Demanding Standard of Deference Under the AEDPA to a Competency-to-be-Executed Claim Where No State Appellate Court Reviewed the Claim Inconsistent with the Eighth Amendment's Heightened Need for Reliability in Death Penalty Cases?

The Eighth Amendment prohibits the execution of a prisoner who is incompetent. Panetti v. Quarterman, 551 U.S. 930, 958 (2007); Ford v.

Wainwright, 477 U.S. 399, 409-10 (1986).[9] In the context of the Eighth Amendment, this Court has repeatedly recognized that state appellate review is necessary to protect against arbitrariness, capriciousness, and error.[10] Pulley v. Harris, 465 U.S. 37, 59 (1984) (Stevens, J., concurring in part) ("[O]ur decision certainly recognized what was plain from Gregg, Proffitt, and Jurek: that some form of meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges."); Parker v. Dugger, 498 U.S. 308, 321 (1991) ("We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.").

Despite this Court's recognition of the need for appellate review in the

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[9] Because a competency-to-be-executed claim does not become ripe until an execution is imminent, Panetti, 551 U.S. at 946 ("claims of incompetency to be executed remain unripe at early stages of the proceedings"), this Court has recognized the exceptional nature of a Ford claim in allowing petitioners the opportunity to litigate it in federal court, even where federal habeas review has already been completed. See Stewart v. Martinez-Villareal, 523 U.S. 637, 639 (1998) (Ford claim not subject to restrictions on "second or successive" habeas petition); Panetti, 551 U.S. at 947 (same).

[10] See also Gregg v. Georgia, 428 U.S. 153, 194 (1976) (plurality) ("[T]he further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner."); cf. Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality) (finding unconstitutional capital sentencing scheme where "there is no way . . . for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences").

context of capital punishment, the per curiam opinion in this case will permit Vernon Madison's execution to proceed based on a trial court determination unreviewed by any state appellate court. While Petitioner believes this is untenable under the Eighth and Fourteenth Amendments, at a minimum it should be resolved by this Court after he has had an adequate opportunity to brief the issue.

III. This Court Should Not Resolve the Substantial and Important Factual Issues in this Case Without Full Briefing and Argument.

In this case, the unrebutted evidence presented in the state trial court established that in January, 2016, Vernon Madison suffered a thalamic stroke, which, along with several previous severe strokes, led to significant decline in his cognitive and bodily functioning; he now speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain. These strokes led to an unrebutted DSM-5 diagnosis of vascular neurological disorder, or vascular dementia and along with cognitive decline and significant memory deficits prevent Mr. Madison from having a rational understanding of why he is to be executed by the State of Alabama.

On the basis of this evidence, each judge on the Eleventh Circuit panel found that as a matter of fact and law, Vernon Madison is incompetent and that his execution is therefore prohibited by the Eighth Amendment. See Madison,

851 F.3d at 1190 ("We therefore conclude that Mr. Madison is incompetent to be executed."); id. (Jordan, J., dissenting) ("I believe that Vernon Madison is currently incompetent. I therefore do not think that Alabama can, consistent with the Constitution, execute him . . . .").

Though this Court explicitly declined to express a view "on the merits of the underlying question outside of the AEDPA context," Dunn, 2017 WL 5076050, at *3, the State of Alabama has now filed a motion seeking an expedited execution date for Vernon Madison, asserting that "there are no further impediments to the execution of Madison's lawful sentence." State of Alabama's Expedited Motion to Set an Execution Date, Nov. 8, 2017.

Given the substantial questions about the parameters of habeas corpus review in the context of an Eighth Amendment competency-to-be-executed claim that was never reviewed by a state appellate court, this Court should grant rehearing so that it may have the benefit of full merits briefing and argument. See McWilliams v. Dunn, 137 S. Ct. 1790, 1807 (2017) (Alito, J., dissenting) (admonishing majority for deciding issue without "receiv[ing] adversarial briefing, which in turn helps the Court reach sound decisions" (internal citations omitted)).

Moreover, full briefing and argument is appropriate in light of the factual determinations made in this Court's summary opinion. First, it is simply not the

case that the lower court opinion (and Dr. Goff's) was based on a finding that Mr. Madison was incompetent to be executed simply because of a "failure to remember his commission of the crime, as distinct from a failure to rationally comprehend the concepts of crime and punishment as applied in his case." Dunn, 2017 WL 5076050 at *2. Rather, the lower court's determination was based on the "unrebutted evidence that Mr. Madison suffers from vascular dementia, has no memory of his capital crime, was not malingering during the experts' evaluations, and believes he has not killed anyone – as well as the utter lack of any testimony that Mr. Madison understands the connection between the murder he committed and his impending execution." 851 F.3d at 1189.

Nor was Dr. Goff's opinion based solely on what Mr. Madison remembered. As Dr. Goff testified, in evaluating Mr. Madison's competency to be executed, Dr. Goff was attempting to find the answer to two questions: "One, is there[] something wrong with him, and the other thing is does what's wrong with him cause him to be incompetent." (Doc. 8-1 at 117.) In this framework, whether an individual "forgets particular phrasing" or "begin[s] to forget certain things" does not invariably indicate that the person is incompetent: rather, it means that "something is wrong with him." (Doc. 8-1 at 117.) And, in Dr. Goff's reasoned professional opinion based on his evaluation of Mr. Madison, the review of significant medical records, and numerous neuropsychological tests, the "thing"

that was wrong with Mr. Madison was that his brain had been traumatized, leading to a DSM-V diagnosis of vascular dementia and corresponding cognitive and memory deficits. (Doc. 8-1 at 107; Doc. 8-3 at 20.)

Moreover, in Dr. Goff's opinion, the "something wrong with him" – the diagnosed condition of dementia and the corresponding deficits – prevents Mr. Madison from rationally understanding his execution. This is precisely the sort of "expert evidence" upon which this Court encouraged reliance in order to clarify the extent to which a petitioner's mental disorder renders him incompetent to be executed. See Panetti, 551 U.S. at 962; see also Ferguson v. Sec'y, Florida Dep't of Corr., 716 F.3d 1315, 1344 (11th Cir. 2013).

And, contrary to this Court's conclusion that "testimony from each of the psychologists who examined Madison supported the court's finding that Madison understands both that he was tried for and imprisoned for murder and that Alabama will put him to death as a punishment for that crime," Dunn, 2017 WL 5076050, at *2, the record establishes that Dr. Goff's conclusion is that Mr. Madison *does not* have a rational understanding of why he is being executed by the State. (Doc. 8-1 at 110, 120 (testifying that Mr. Madison does not "understand the act that he's being – that he's being punished for."). Whatever awareness Dr. Goff determined that Mr. Madison had of the "nature of execution," as well as "what he was tried for," it does not necessarily render Mr.

Madison competent because, as this Court established in Panetti, a "prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it," 551 U.S. at 959. As to the critical question of whether Mr. Madison had a rational understanding of his planned execution, in Dr. Goff's professional opinion, Mr. Madison "does not seem to understand the reasoning behind the current proceeding as it applies to him." (Doc. 8-3 at 19.)

Critically, Dr. Kirkland, the State's expert,[11] when asked by the state trial judge about whether he had an "opinion as to whether Mr. Madison understands that the State is seeking retribution against him for an act that he committed in the past," responded only that Mr. Madison, "talked specifically about death sentence versus life without in the original trial and the first retrial and in the second." (Doc. 8-1 at 124.) Similarly, when asked by counsel for the State about whether Mr. Madison had knowledge of his execution, Dr. Kirkland testified that Mr. Madison "understands that that is, as applied to him, that he has two

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[11] This Court summarily reversed even though Dr. Kirkland was arrested and charged with multiple counts of Unlawful Possession or Receipt of a Controlled Substance on April 18, 2016, just four days after Mr. Madison's competency hearing. Montgomery Psychologist Charged with Using Forged Prescription, WSFA 12 (Aug. 18, 2016 2:56 pm) http://www.wsfa.com story/32792305. Dr. Kirkland was suspended from the practice of psychology on September 9, 2016. See Ala. Bd. of Exam'r in Psychology, Psychologist Search or License Verification, www.psychology.state.al.us/licensee.aspx (search "Karl Kirkland") (last visited Nov. 16, 2017).

choices or two sentences that are – that are there; one being execution and one being life without parole." (Doc. 8-1 at 78-79.) Dr. Kirkland could not explain why he did not include this information in his written report, (Doc. 8-1 at 80-81), or that such information was actually not true: at no point in his appeals has the sentence of life without parole been available to Mr. Madison.

These are precisely the type of factual issues that need to be resolved in full briefing and argument and for this reason, rehearing is appropriate. See Schweiker v. Hansen, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) (summary disposition only appropriate in cases where "law is settled and stable, the facts are not in dispute, and the decision below is clearly in error").

CONCLUSION

Mr. Madison respectfully requests that this Court grant the petition for rehearing and order full briefing and argument on the merits of this case.

Respectfully Submitted,

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I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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